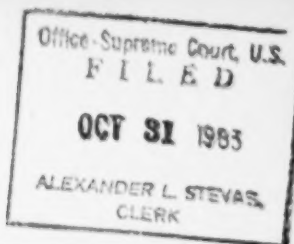


83-740



NO.

IN THE SUPREME COURT OF THE  
UNITED STATES

OCTOBER TERM, 1983

DEL-AWARE UNLIMITED INC., et al.,  
Petitioners,

v.

ROGER W. BALDWIN, District Engineer,  
United States Corps of Engineers, et al.  
Respondents

APPENDIX TO  
PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

ROBERT R. ELLIOTT  
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(202) 887-5858

ROBERT J. SUGARMAN  
ROBIN T. LOCKE

Of Counsel:

Counsel for Plaintiffs

SUGARMAN & DENWORTH  
121 S. Broad Street  
Suite 510  
Philadelphia, PA 19107  
(215) 546-0162

Dated: October 31, 1983

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 83-1010

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DELAWARE UNLIMITED, INC.; SIGSTEDT, VAL; WELLS, COLLEEN;  
SADOUX, MARC; MASLAND, MARION W.; TOWNSHIP OF BRISTOL;  
TORKELSON, NORMAN and DIANE; THE PHILADELPHIA FEDERATION OF  
SPORTSMEN'S CLUBS; LANDIS, SAMUEL; GILMORE, CHARLES;  
NOBLE, MARY ELLEN; THE PENNSYLVANIA STATE FEDERATION OF  
SPORTSMEN'S CLUBS; BANNING, RITA C., HONORABLE; WATERSHED  
ASSOCIATION OF THE DELAWARE RIVER; GREENWOOD, JAMES C.,  
HONORABLE; POWASH, CARL, HONORABLE,

Appellants

v.

ROGER W. BALDWIN, individually, and as District Engineer,  
U.S. Army Corps of Engineers; ALEXANDER ALDRICH, individually,  
and as Chairman of the Advisory Council on Historic  
Preservation; WILLIAM GORDON, individually, and as  
Assistant Secretary, U.S. Department of Commerce;  
GERALD HANSLER, individually and as Executive Director,  
The Delaware River Basin Commission; HAROLD DENTON,  
individually, and as Director, Division of Nuclear Reactor  
Regulation, U.S. Nuclear Regulatory Commission; THE NUCLEAR  
REGULATORY COMMISSION; HONORABLE PETER DUNCAN, as Secretary  
of the Department of Environmental Resources of the  
Commonwealth of Pennsylvania; WESHAMINY WATER RESOURCES  
AUTHORITY; and PHILADELPHIA ELECTRIC COMPANY

---

Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil Action No. 82-5115)  
District Judge: Honorable James Giles

---

Argued June 13, 1983

Before HUNTER, HIGGINBOTHAM, Circuit Judges, and  
IEGLER,\* District Judge

---

\*Honorable Donald E. Iegler, United States District Judge for  
the Western District of Pennsylvania, sitting by designation

JUDGMENT ORDER

Appellants appeal from an interlocutory order of the district court denying appellants' motion for preliminary injunction. After consideration of all contentions raised by appellants, to wit, that the court erred:

- 1) as a matter of law by excluding from evidence virtually all of appellants' proffered testimony and documentation which was not included in the Corps' administrative record;
- 2) in holding that section 110(f) of the National Historic Preservation Act did not require the Corps to implement measures and consider alternatives which would minimize harm to the Pennsylvania Canal;
- 3) in finding that the Corps had given "great weight" to the views of the state and federal fisheries agencies, as required by its statute and regulations;
- 4) in finding insufficient likelihood of success on the merits of the NEPA claims to require injunctive relief,

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

Certified as a true copy and issued in lieu of a formal mandate on August 18, 1983.

Test:

Clerk, United States Court of Appeals for the Third Circuit.

BY THE COURT,

JAMES BOWEN, III, Circuit Judge

Attest:

M. Elizabeth Ferguson  
Chief Deputy Clerk

Dated: July 5, 1983

**COPY**



UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

No. 83-1010

---

DEL-AWARE UNLIMITED, INC.; SIGSTEDT, VAL; WELLS, COLEEN;  
SADOUX, MARC; MASLAND, MARION W.; TOWNSHIP OF BRISTOL;  
TORKELSON, NORMAN and DIANE; THE PHILADELPHIA FEDERATION OF  
SPORTSMEN'S CLUBS; LANDIS, SAMUEL; GILMORE, CHARLES;  
NOBLE, MARY ELLEN; THE PENNSYLVANIA STATE FEDERATION OF  
SPORTSMEN'S CLUBS; BANNING, RITA C., HONORABLE; WATERSHED  
ASSOCIATION OF THE DELAWARE RIVER; GREENWOOD, JAMES C.,  
HONORABLE; FOMASH, CARL, HONORABLE,

Appellants

v.

ROGER W. BALDWIN, individually, and as District Engineer,  
U.S. Army Corps of Engineers; ALEXANDER ALDRICH, individually,  
and as Chairman of the Advisory Council on Historic  
Preservation; WILLIAM GORDON, individually, and as  
Assistant Secretary, U.S. Department of Commerce;  
GERALD HANSLER, individually and as Executive Director,  
The Delaware River Basin Commission; HAROLD DENTON,  
individually, and as Director, Division of Nuclear Reactor  
Regulation, U.S. Nuclear Regulatory Commission; THE NUCLEAR  
REGULATORY COMMISSION; HONORABLE PETER DUNCAN, as Secretary  
of the Department of Environmental Resources of the  
Commonwealth of Pennsylvania; MESHAMINY WATER RESOURCES  
AUTHORITY; and PHILADELPHIA ELECTRIC COMPANY

---

SUB PETITION FOR REHEARING

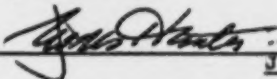
Present SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER,  
WEIS, CARTE, HIGGINBOTHAM, BECKER, Circuit Judges

\_\_\_\_\_  
The petition for rehearing, filed by

APPELLANTS

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

  
\_\_\_\_\_  
Judge

Dated August 2, 1963

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RECEIVED

DEC 22 1982

DEL-AWARE UNLIMITED, INC., et al. : CIVIL ACTION  
v. :  
ROGER M. BALDWIN, et al. : NO. 82-5115

SUGARMAN AND GERNERTH

ORDER

FILED DEC 17 1982

AND NOW, this 17th day of December, 1982, in accordance with the bench opinion rendered December 15, 1982, it is hereby ORDERED that:

1. The claims asserted by plaintiffs under the Rivers and Harbors Act, 33 U.S.C. § 401, et seq., the Clean Water Act, 33 U.S.C. § 1365, et seq., the Endangered Species Act, 16 U.S.C. § 1540, et seq., and the National Historic Preservation Act, 16 U.S.C. § 470, et seq., are DISMISSED for lack of jurisdiction.

2. Plaintiffs' claims against the Nuclear Regulatory Commission, and Harold Denton in his individual and official capacity are DISMISSED for lack of jurisdiction.

3. Plaintiffs' claims against the Department of Environmental Resources of the Commonwealth of Pennsylvania (PDER), and Peter Duncan in his official capacity as Secretary of PDER, are DISMISSED for lack of jurisdiction. In the alternative, these claims are DISMISSED on the basis of comity and this court's determination not to exercise pendent

ENTERED: 12-20-82

CLERK OF COURT

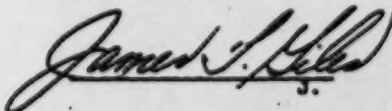
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jurisdiction. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

4. Plaintiffs' claims against Roger Baldwin, District Engineer, U.S. Army Corps of Engineers, Alexander Aldrich, Chairman of the Advisory Council on Historic Preservation, William Gordon, Assistant Secretary, U.S. Department of Commerce, and Gerald Hansler, Executive Director of the Delaware River Basin Commission (DRBC), in their individual capacities, are DISMISSED.

5. Plaintiffs' motion for preliminary injunction as to the remaining defendants asserted under the National Environmental Policy Act (NEPA), 16 U.S.C. § 150, et seq., the Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq., and under common law with respect to the DRBC, is DENIED. Whether singly or cumulatively, the issues raised by plaintiffs are insufficient on the record evidence to show that defendants acted unreasonably, arbitrarily or capriciously in determining that an Environmental Impact Statement was not required and in rendering a negative declaration as to the planned construction of the Point Pleasant Water Diversion Project.

BY THE COURT:

James T. Gilh

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE UNLIMITED, INC., : CIVIL ACTION  
VAL SIGSTEDT, COLLEEN WELLS, MARC :  
SADOUX, MARION W. MASLAND, Township :  
of Bristol, NORMAN and DIANE :  
TORKELSON, The PHILADELPHIA :  
FEDERATION OF SPORTSMEN'S CLUBS, :  
SAMUEL LANDIS, CHARLES GILMORE, :  
MARY ELLEN NOBLE, THE PENNSYLVANIA :  
STATE FEDERATION OF SPORTSMEN'S : NO. 82-5115  
CLUBS, HONORABLE RITA C. BANNING, :  
WATERSHED ASSOCIATION OF THE :  
DELAWARE RIVER, HONORABLE JAMES C. :  
GREENWOOD AND HONORABLE CARL FONASH. :  
Plaintiffs

vs.

ROGER M. BALDWIN, individually and :  
as District Engineer, U.S. Army :  
Corps of Engineers, and :  
ALEXANDER ALDRICH, individually :  
and as Chairman of the Advisory :  
Council on Historic Preservation, :  
WILLIAM GORDON, individually and :  
as Assistant Secretary, U.S. Dept. :  
of Commerce, GERALD HANSLER, :  
individually and as Executive :  
Director, The Delaware River :  
Basin Commission, HAROLD DENTON, :  
individually and as Director, Division :  
of Nuclear Reactor Regulation, U.S. :  
THE NUCLEAR REGULATORY COMMISSION, :  
HONORABLE PETER DUNCAN, as Secretary :  
of the Department of Environmental :  
Resources of the Commonwealth of :  
Pennsylvania, WESHAMINY WATER :  
RESOURCES AUTHORITY, and :  
PHILADELPHIA ELECTRIC COMPANY, :  
Defendants.

December 15, 1982

BEFORE: HONORABLE JAMES T. GILES, J.

Reported by:  
Sidney Rothschild OFFICIAL COURT REPORTERS  
Room 2702  
U.S. Courthouse  
Philadelphia, Pa. 19106

WAlmut 6-9490

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THE COURT: Good afternoon.

First of all, the record will be completed by the following: By letter of submission of December 8, 1982, DRBC sent in a copy of its Exhibit Number 15. That will be admitted.

By letter of submission of December 13, the plaintiffs submitted a copy of P-58, which is a memorandum dated May 28, 1981, Archaeologist, Office of Cultural Programs, NERC, HHS to Assistant Regional Director, Office of Cultural Program NERC, HHS Subject: Trip Report, Point Pleasant Water Diversion Project, Point Pleasant, Pennsylvania.

This document will be admitted.

Philadelphia Electric Company was given leave to file certain documents pertaining to proceedings before the NRC, in response to plaintiffs' submissions pertaining to NRC matters. Those submissions will be admitted as PECO exhibits, whatever the next PECO number is, according to the record.

MR. CHAMIN: If Your Honor please, that is Exhibit 4.

THE COURT: That will be admitted along with the certificate of service form which is attached thereto.

The hearing in this matter concluded Friday evening, the Court has reviewed the entire administrative record, all the exhibits introduced in this proceeding, the

1 various memoranda, responses, attachments thereto, legal  
2 authorities cited, including statutes, regulations and  
3 legislative history.

4 Counsel are to be commended for doing a fine  
5 job in pulling together, in a short time, during and after  
6 the conclusion of the proceeding, the evidence in the case  
7 and focusing it in a manner helpful to the Court.

8 I have agreed to give a bench opinion because  
9 both parties have asserted that by today, by virtue of the  
10 actions proposed of the NWRA to commence construction, it  
11 would suffer or begin to suffer irreparable harm. I devoted  
12 my time to this point in reviewing the record and making my  
13 decision and this opinion will constitute the opinion of the  
14 Court with respect to the plaintiffs' motion for preliminary  
15 injunction. The Court reserves the right to supplement,  
16 amend or edit the same.

17 This action was commenced by plaintiffs  
18 substantially as citizens action against various federal  
19 agencies, the Pennsylvania Environment Resources Department,  
20 DER, PECO, Philadelphia Electric Company, and NWRA, which is  
21 the Meshaminy Water Resources Authority.

22 Individuals have also been named as defendants  
23 in their individual and official capacities, where they are  
24 the executive directors of the various defendant agencies.

25 The action is commenced against all defendants,

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1 it appears under the National Environmental Pol. y Act, the  
2 National Historic Preservation Act, the Endangered Species  
3 Act, the Delaware River Basin Compact, the Fish and Wildlife  
4 Coordination Act, the substantive provisions of Section 110  
5 of the River and Harbors Act of 1899 and Section 404 of the  
6 Water Pollution Control and Federal Water Pollution Control  
7 Act requirements for permits under Section 402 and for best  
8 available technology under Section 316(b) and the Atomic  
9 Safety and Licensing Act and regulations thereunder,  
10 referring to page 2 of the complaint.

11           The plaintiff either orally or in the final  
12 briefs in this matter has asserted that it intended to file  
13 a claim under the Administrative Procedure Act, the plaintiff  
14 does not assert a claim under the Administrative Procedure  
15 Act. For purposes of this bench opinion, I shall assume that  
16 the plaintiff has standing to assert and therefore is  
17 entitled to amend the complaint to assert a claim under the  
18 Administrative Procedure Act against the appropriate agency  
19 defendants.

20           The complaint, while it names the Delaware  
21 River Basin Commission as a defendant and its executive  
22 director, in the caption fails to state a cause of action in  
23 its body against the Delaware River Basin Commission.

24           The plaintiff was understood by the Court to  
25 amend orally the complaint at the time of the hearing to



1 assert a claim against the DRBC, that its denial of the  
2 Delaware petition for reconsideration was arbitrary and  
3 capricious and therefore reviewable in this Court.

4 Various defendants have filed motions to  
5 dismiss, either on jurisdictional grounds with respect to  
6 certain allegations or with respect to failure to state a  
7 claim upon which refusal can be granted.

8 With respect to the claims of the plaintiffs  
9 asserted under the National Historic Preservation Act, the  
10 Endangered Species Act, the Clean Water Act and the River  
11 and Harbors Act, I find that this Court has no jurisdiction.  
12 Those acts of Congress have specific provisions which limit  
13 the right of citizens to bring suits in this Court. There are  
14 notice and time provisions which are mandatory. There is no  
15 implied cause of action under the River and Harbors Act, in  
16 accordance with the decision of the United States Supreme  
17 Court and using the same rationale, there is no implied cause  
18 of action under either of the National Historic Preservation  
19 Act and Endangered Species Act or Clean Water Act.

20 Congress has acted in these areas to  
21 circumscribe the availability of the federal court to  
22 plaintiffs unless and until certain statutory requirements  
23 are met. Plaintiffs appear to concede as much in that they  
24 argue in their beliefs that they would still have a right of  
25 action under the Administrative Procedure Act, because either

1 there is final agency action or that there is action by the  
2 agency which is so threatening of immediate and irreparable  
3 harm that resort to the Court is necessary to enjoin agency  
4 action.

5           With respect to plaintiffs' claims against  
6 the NRC and Harold Denton in his individual and official  
7 capacities, I find that this Court is without jurisdiction  
8 and it would be an abuse of discretion to exercise jurisdiction  
9 in the context of this complaint, even assuming that the  
10 Susquehanna case is still good law in this circuit. First,  
11 there is an ongoing administrative review of the PECO-Limerick  
12 application within the domain of the Nuclear Regulatory  
13 Commission. Plaintiffs, through Delaware are participating  
14 in that administrative proceeding, which is not complete.  
15 When completed, the plaintiffs, if agreed, will have a right  
16 of appeal to the Third Circuit by statute.

17           Number two, the construction activity which is  
18 the subject of this injunction action names MWRA as the  
19 builder and constructor of the water system. NRC has no  
20 jurisdiction to enjoin MWRA's construction. NRC will  
21 determine when, if at all, the PECO water diversion to  
22 Limerick I or II will be operational. That is not before  
23 this Court.

24           Furthermore, the NRC has not refused to prepare  
25 an environmental impact study. This situation is easily

1 distinguishable from the Susquehanna case cited by the  
2 plaintiffs for the reasons just enumerated.

3               So, the claims asserted under the Atomic  
4 Safety and Licensing Act, are hereby dismissed.

5               With respect to the claims against Roger  
6 Baldwin, as an individual; Alexander Aldrich, as an individual;  
7 William Gordon, as an individual and Gerald Mansler, as an  
8 individual; I find that the plaintiffs' complaint fails to  
9 state a cause of action and those actions will be dismissed  
10 with prejudice for the following reasons. Although the  
11 plaintiffs assert that Baldwin, Aldrich, Gordon and Mansler  
12 are being sued in their individual capacities, a review of  
13 the complaint discloses no action by those individuals which  
14 amounts to individual actions, as opposed to action in their  
15 official capacities.

16              Moreover, the relief sought by the plaintiffs  
17 is against the agency. If plaintiffs are asserting a claim  
18 under the Administrative Procedure Act, for example, the  
19 proper claim is against the agency, not the individual.

20              Moreover, I would find from a review of the  
21 record and the complaint, that each of the individuals is  
22 entitled to qualified immunity. I might say, as well, that  
23 the proceeding       is not really as on motion to dismiss.  
24 It's after hearing.

25              With respect to the Pennsylvania Department of

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1 Environmental Resources and Peter Duncan, I find that this  
2 Court has no jurisdiction. The claims there asserted are  
3 under the Clean Water Act. Again, there is a jurisdictional  
4 requirement of notice.

5 Moreover, I doubt that this Court would have  
6 jurisdiction in an APA claim against federal agencies, over  
7 state agencies, with respect to their administrative agency  
8 compliance. Further, the plaintiffs are pursuing in the  
9 state administrative channels, challenges to the Pennsylvania  
10 DER Acts with respect to various certificates or decisions  
11 not to require permits of various kinds.

12 As a matter of comity, plaintiffs would be  
13 required in this Court's estimation, to exhaust administrative  
14 remedies in the state procedure and seek whatever relief is  
15 appropriate there.

16 So, even assuming that this Court has  
17 jurisdiction with respect to the Pennsylvania DER defendants,  
18 it would not exercise that jurisdiction.

19 For those reasons, the complaint with respect  
20 to Peter Duncan as secretary of the DER is dismissed. As a  
21 footnote, I observe that there is no emergency situation  
22 arising from the claimed inaction of the state official in  
23 this instance. It is conceded that the Delaware River Water  
24 will not in any way lower the standards of the water in the  
25 Perkiomen Creek and that the best available technology is

1 being used for the intake at Point Pleasant.

2           Remaining, I find are claims asserted under the  
3 National Environmental Policy Act and the Administrative  
4 Procedure Act. Having studied all of the relevant material,  
5 as well as that which might be irrelevant, but admitted and  
6 reviewable, I have concluded that the plaintiffs' motion for  
7 preliminary injunction will be denied under both the NEPA  
8 and the APA against each of the remaining defendants.

9           First, with respect to the NEPA and the Corps  
10 of Engineers. Plaintiffs complain that the Corps of Engineers  
11 in rendering its environmental assessment and negative  
12 declaration with respect to the Point Pleasant intake and  
13 water diversion system, either acted unreasonably or  
14 arbitrary and capriciously in failing to require or failing  
15 to conduct an environmental impact study or statement.

16           The standard of reasonableness is a higher  
17 standard of review than arbitrary and capricious, but I find  
18 under either standard, the plaintiffs at this juncture on this  
19 record have not shown under the standard applicable to  
20 considering requests for preliminary injunction have  
21 entitlement to that extraordinary relief. This Court is  
22 limited under the reasonableness standard to a review of the  
23 actions of the defendant agencies and cannot engage in its  
24 own personal evaluation of the mental processes of the agency  
25 administrators.

/xc

So, it's not a matter of record of what this Court would do if it were in the agency's position; it is what the record shows reasonably was considered, taking not only the findings but the administrative record as a whole and considering the administrative record as a whole, I find that with respect to a significant number of plaintiffs' claims, they are collaterally estopped because of the Hansler decision.

The plaintiffs have made out a prima facie case with respect to identifying certain changes since the Hansler decision, which would be of significant impact, if the plaintiffs' allegations were taken as true, but considering the defendant agency's evidence as this Court must at this stage, I find that the plaintiff has not shown by a preponderance of the evidence that there was either an abuse of discretion or a failure to give a hard look at, seriously consider, or give great weight to other agency opinion.

The plaintiffs here are collaterally estopped by the Hansler decision to the extent that the Hansler decision considered or was asked to consider and decided matters which are raised in this complaint. A study of the complaint in the Hansler case demonstrates that it was wide ranging and touched upon almost all the issues which are raised here as if they were new.

The plaintiffs are bound because they are in

A 16

1 plicity with those plaintiffs who initiated the action before  
2 Judge VanArtsdalen in this respect: That the plaintiffs there,  
3 as the plaintiffs here represented the public interest and  
4 their interests and injuries now rise no higher and are no  
5 less than those asserted by the plaintiffs in Hansler for  
6 the public interest.

7 Judge VanArtsdalen considered not the name of  
8 the plaintiff but rather the issue, that is whether or not  
9 certain actions or environmental effects were significant or  
10 substantial so as to require of the DRBC the preparation of  
11 an environmental impact statement as opposed to a final  
12 environmental assessment. This Court incorporates all that  
13 was decided and considered and therefore precluded here by  
14 Judge VanArtsdalen in the Hansler case and as affirmed by the  
15 Third Circuit.

16 What then is new?

17 1. Designation of the Army Corps of  
18 Engineers as the lead agency in determining those matters,  
19 environmentally, which were within its specific expertise:  
20 navigation, construction in the river, and matters relating  
21 to the construction as it would affect navigable waters.

22 2. A movement of the intake system away from  
23 the shore bank and into the channel of the Delaware River.

24 3. A formal determination by the Advisory  
25 Council on Historic Preservation that the village of Point



1 Pleasant was eligible for and was then placed on the historic  
2 register.

3 4. An assertion that Shortnosed Sturgeon  
4 had been seen in the area of Point Pleasant intake although  
5 the report was unconfirmed.

6 A decision by the Corps of Engineers to  
7 segment its consideration of the NWRA permits between Point  
8 Pleasant and the Pine Run rechannelization.

9 A salinity study performed by the DRBC, a  
10 ground water study done for and by the DRBC.

11 Next, the most current good faith negotiations  
12 between those states who are parties to the DRBC.

13 Next, a statutory provision change, 110(f),  
14 I believe, which the plaintiffs assert required the Corps to  
15 take all possible steps to maximize non-impact on national  
16 landmarks or historical sites. In the latter category,  
17 assert that the authority had the obligation independently to  
18 consider other intake sites than Point Pleasant, so as to  
19 avoid the historical and archaeological sites altogether.

20 This Court is called upon, therefore, to  
21 interpret that provision. In the findings of facts or the  
22 statement of findings, the Corps made specific findings that  
23 it had considered alternative routes around Point Pleasant  
24 but these were unreasonable for the reasons stated therein.  
25 Moreover, in accordance with 33 CFR 800, a memorandum of



1 agreement was entered into between the Corps, the Advisory  
2 Council and the State Historical Preservation officer, with  
3 respect to procedures to minimize the impact of the historic  
4 district, the channel, and all other areas disrupted by the  
kt 5 construction. The undertaking in the memorandum agreement  
/kts is to have continued monitoring by the Advisory Council,  
7 state office, the states, Historical Preservation officer  
8 and the Corps to insure that all possible steps are taken to  
9 minimize the impact to the historical district canal. Indeed,  
10 as I read the agreement, no irreversible action can be taken  
11 out and a determination that the action is an action which  
12 meets their requirements of 33 CFR 800. The plaintiffs argue  
13 that Section 110(f) required the Corps to look for other  
14 intake sites along the Pennsylvania canal, other than Point  
15 Pleasant, once the historic district has been certified.

16  
17 The Corps took the position in its findings,  
18 that it was bound in terms of its consideration of what was  
19 possible by the determination of the DRBC as to the appropriate  
20 point for water to be taken from the Delaware River.

21 In other words, it deferred to the DRBC with  
22 respect to that judgment as to whether or not that point of  
23 intake was most appropriate, given its other determinations  
24 of river resources, basin resources and the needs for water  
25 in Bucks and Montgomery Counties, as well as for PECO at  
26 Limerick.

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4 I do not find that that deference was  
5 unreasonable or arbitrary and capricious. There is a question  
6 as to whether or not Section 110(f) applies to other than  
7 federal or federally assisted projects. Assuming that it  
8 does, it is not to be given the same scope of agency  
9 determination requirement as was given and required by  
10 statute in the Overton Park case. In that case, the statute  
11 required that the agency make a determination that there was  
12 no feasible or practical route for highway, other than  
13 through a park and only after such determination was made,  
14 could be administrator go on to determine what steps should  
15 be taken to minimize the impact on the park area.

16 Here, the Congress decided to delete the  
17 requirement for determination by the agency administrator as  
18 to feasible or practical alternatives, leaving only that  
19 section which required the administrator to determine what  
20 steps would maximize or diminish the impact on the historic  
21 district.

22 Considering the legislative history, I do not  
23 find that there was a requirement on the Corps to make a  
24 determination independently that there was some other place  
25 than Point Pleasant for the intake, assuming 110(f) applied.  
26 I find that the Corps did consider and gave great weight to  
27 the determination by DRBC, that Point Pleasant was the proper  
28 site for the intake to accomplish the water supply permits

1 which it had issued, pursuant to the entire history of the  
2 Point Pleasant project, including those matters which were  
3 before Judge VanArtsdalen.

4 To the extent that the Corps referenced and  
5 included all of the proceedings by reference that had gone  
6 before, I find on this record, that the Corps did consider  
7 that history in determining the appropriateness to defer to  
8 the DRBC decision to Point Pleasant as the intake location  
9 and there is evidence in the record that the Corps did review  
10 and consider all of the documentation pertaining to the Point  
11 Pleasant project as considered by the DRBC and the AEC and  
12 the NWRA. So, I do not find it reasonable to construe 110(f)  
13 as requiring an administrator to do other than take all  
14 possible steps open and available to it at that time to  
15 minimize the impact on the historic district or canal. The  
16 Corps considered all of the options open to it and on this  
17 record, acted reasonably in arriving at a memorandum of  
18 agreement.

19 Under the applicable regulations, there's a  
20 presumption that the memorandum agreement satisfies the  
21 obligation of the Advisory Council to advise. I believe the  
22 language of the regulation is that the entering into a  
23 memorandum of agreement satisfies the obligations of the  
24 Advisory Council.

25 For that reason, I would find that as to the

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1 Advisory Council, that injunctive action is not appropriate  
2 under the Administrative Procedure Act. The Advisory Council  
3 has satisfied the requirements of the regulations. It has  
4 not undertaken any final action with respect to any  
5 irreversibly damaging action, with respect to the canal or  
6 the historic district as certified.

7 I find that the record is sufficient for this  
8 stage of the proceedings to satisfy me that the Corps studied  
9 and considered the effect of moving the intake 245 feet into  
10 the Delaware River as it effects or is considered in  
11 conjunction with the black eddy, salinity, the effect on the  
12 oyster industry and fisheries, dissolved oxygen, shad,  
13 Shortnose Sturgeon, blasting effects, dredging, effects on  
14 fish other than shad and Shortnose Sturgeon, flow velocity  
15 at the intake, the effects of impingement and entrainment of  
16 fish at the intake, the level of the top of the intake in  
17 the river below the surface of the river at various flows,  
18 the effect on navigation, recreation and safety to those  
19 persons using the river at that point for fishing or other  
20 forms of river recreation.

21 With respect to the salinity, I find that the  
22 diversion of water could be said to have been reasonably found  
23 by the Corps not to have any significant environmental impact.  
24 Only 8 CFS of the diversion can be said to be subject to  
25 consumption. As to that amount, there is no dispute that

1 that is not measureable by existing gages. Critically  
2 important, it appears from the record, that to the  
3 determination of the DRBC and the Corps, that the Point  
4 Pleasant project would not have any adverse effect on the  
5 salinity level being placed at Point Pleasant, is that with  
6 the water returns, 50 percent of the water will be returned  
7 to the Delaware River above or at the Schuylkill River mouth.

8 The Schuylkill River mouth is stated in the  
9 literature in the record to be important as a stream flow to  
10 the curtailment of the salinity level.

11 So, all the water taken out will be put back  
12 in, at least that which is measureable. So, to the extent  
13 the plaintiffs argue that the diversions will adversely  
14 affect salinity, I find that that is not borne out by the  
15 record. Moreover, it was considered and discussed by Judge  
16 VanArtsdalen.

17 With respect to dissolved oxygen, I find from  
18 this record, that there are studies available to the Corps  
19 which were available to the Corps which showed that these  
20 diversions or this diversion at Point Pleasant would have no  
21 significant environmental impact.

22 Flows less than that which would be caused  
23 by the diversions even at maximum diversion would not  
24 significantly change the dissolved oxygen level at any point  
25 along the river.

1 With respect to the flow velocity at the  
2 intake level, I find that the evidence is, in this record,  
3 satisfies the reasonableness and the arbitrary and capricious  
4 test in that there were studies to show that given the  
5 placement of the intake, the kind of intake, the placement  
6 of the intake tubes close to one another and so forth, that  
7 there would be no significant impact on fish.

8 The studies made were put on a worse case  
9 basis, assuming that there was a spawning ground and the  
10 Point Pleasant eddy, that shad would be there as well as  
11 Shortnosed Sturgeon either spawning or moving past that  
12 point.

13 The size of the intake screens are two  
14 millimeters, that size was considered in relationship to the  
15 larva of shad and sturgeon and other fish, although no tests  
16 were made on shad per se, there were tests made on fish eggs  
17 smaller in size than shad eggs, leading reasonably to the  
18 conclusion that shad eggs would not be impinged.

19 Moreover, the swimming ability of shad was  
20 considered. The flow velocity is calculated to be two to  
21 one at the intake but the intake structure as presently  
22 designed, in cooperation with the Pennsylvania Fish Commission  
23 and the United States Fish and Wildlife Service is a state of  
24 the art intake, which has very little impact upon early stages  
25 of fish, even assuming less than 2-to-1 velocity flow at intake.

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1 The intake velocity diminishes dramatically as one moves one  
2 foot from the intake.

3 There was a netting operation in the vicinity  
4 of the intake for Shortnosed Sturgeon, which in 1981 disclosed  
5 no sturgeon. No sturgeon had been caught in the immediate  
6 vicinity of the intake.

7 The Shortnosed Sturgeon is an endangered  
8 species, there was a determination by the U.S. Department of  
9 Commerce that the Point Pleasant water diversion project would  
10 not endanger species in the river; further made determinations  
11 that the proposed operations would not constitute significant  
12 environmental impact with respect to that endangered species.  
13 It made a determination that its biological opinion was not  
14 related to river flow, rather to what was known about the  
15 Shortnosed Sturgeon and that is, that its eggs fall to the  
16 river bottom, attach to rocks, or fall or find their way  
17 under rocks, and hence, are not subject to intake velocity  
18 considerations.

19 Moreover, there was a determination made but  
20 there would be ongoing studies by the applicant, so that  
21 monitoring would be made to insure that the project in no way  
22 endangered Shortnosed Sturgeon.

23 As I said before, the intake is designed  
24 anticipating the presence of Shortnosed Sturgeon, though there  
25 is no evidence of Shortnosed Sturgeon in the area.

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1                   On the basis of this record, I find there is  
2 no basis for injunctive action with respect to the Department  
3 of Commerce either under NEPA, under the APA.

4                   Plaintiffs really have not offered anything to  
5 refute the biological opinion rendered.

6                   MR. LERNER: Excuse me, Your Honor, can we  
7 take a brief recess?

8                   THE COURT: You may.

9                   With respect to esthetics, which would include  
10 the height of any buildings, the noise of any transformers,  
11 the replanting of any areas affected by the construction,  
12 including the bluff, the evidence shows that there is a  
13 memorandum of agreement to blend the underground piping and  
14 buildings in the environment.

15                   Apparently, plaintiffs complain that the bluff  
16 outside of the certified historic district is not being  
17 considered. However, I understand from this record that the  
18 pipeline as to the bluff will be underground and covered.

19                   There was the consideration of the archaeology  
20 in the area. There is no evidence at that time that there is  
21 any archaeology or aboriginal site in the direct line of the  
22 water transmission lines. There is an archaeologist, who  
23 as a condition of the permit is present at the site, supervising  
24 both operations in or about the canal as well as those  
25 pertaining to the esthetics. And, the Pennsylvania Historical



1 Preservation officer is there to approve any and all action.

2           Plaintiff claims the Corps acted arbitrarily and  
3 capriciously or unreasonably in failing to consult or to  
4 consult in good faith with the Fish and Wildlife Service which  
5 opposed the Point Pleasant diversion. I find that Corps did  
6 consult and did consider all of the positions advanced by the  
7 Fish and Wildlife Service as well as the Pennsylvania Fish  
8 Commission. Simply because the Fish and Wildlife Service had  
9 a reluctance to agree with the Corps, that the permit issue,  
10 it was the Corps' decision and not Fish and Wildlife's, with  
11 respect to permit issuance. The Fish and Wildlife Service did  
12 not elevate the matter as it had a right to do and its failure  
13 to do so is evidence that it did not on appeal see any  
14 significant environment impact.

15           Nothing new was raised by the Fish and Wildlife  
16 Service that had not been considered by the Corps.

17           Plaintiffs argue that the Corps erred in not  
18 considering that with respect to the permit application the  
19 Pennsylvania Utility Commission had rejected PECO's  
20 application there for a license to commence operation of  
21 Limerick II. The record shows that reasonable it would have  
22 been engineering-wise unsound to treat the application and  
23 permit or construction as involving only water for Limerick  
24 II. Limerick I had been authorized and encouraged by the  
25 PUC. Moreover, NWRA, and independent water requirement and

1 BECO's possible withdrawal with respect to Limerick II, would  
2 not have greatly enlarged the project of NWRA.

3 Plaintiffs argue that the Corps erred in  
4 issuing its permit while NRC or other local state agencies  
5 had not acted with respect to their permits which might be  
6 required. I believe counsel conceded during the hearing,  
7 that there is no statutory or regulatory requirement in that  
8 regard.

9 Plaintiff's main argument is that the Corps  
10 erred in segmenting the Point Pleasant project from the  
11 Pine Run rechannelization.

12 There is a regulation which requires applicants  
13 to submit applications for an entire project as opposed to  
14 piecemeal submission, that regulation came into effect in  
15 1982, two years after the applications had been filed by NWRA;  
16 that regulation does not take away the discretion of the Corps  
17 to determine that objectively there should be a division of  
18 the project and here there is evidence that the rechannelization  
19 though beneficial too, is not essential to the operation of  
20 the water diversion system project. Therefore, even if there  
21 is some environmental effects relative to the rechannelization,  
22 it is not essential to the operation of the system. With  
23 respect to the canal, itself, Pennsylvania authorities have  
24 review the proposed construction and have determined that  
25 the proposed construction under the canal will benefit the

1 canal. The Commonwealth of Pennsylvania owns the canal. The  
2 kind of intrusions into the canal or under the canal, are not  
3 uncommon along its route.

4 Now, with respect to the plaintiffs' claim that  
5 the Corps did not consider a final level B study or a ground  
6 water study done for the DRBC in making its determinations,  
7 I find that again, it was reasonable for the Corps to defer  
8 to the DRBC and this is consistent with the determination by  
9 Judge VanArtsdalen in the Hansler case. The level B study  
10 is not inconsistent with the management powers of the DRBC  
11 to limit the withdrawals for PECO, if river flow is below  
12 3000 CFS and to manage the withdrawal of the potable water  
13 by NWRA in times of drought, nor is it inconsistent with the  
14 declared management objectives of the DRBC at Montgomery-Bucks  
15 County or other areas having ground water, develop a better  
16 system for utilization of ground water in conjunction with  
17 surface water.

18 With respect to the ground water study  
19 completed in September of 1982, it does appear from the  
20 report that the rechargeable rate for wells in the kind of  
21 rock which is prevalent in these counties is very slow and  
22 unpredictable.

23 With respect to plaintiffs' contentions that  
24 PECO or NWRA could get their water from Philadelphia or other  
25 places, including ground water wells, I find that the

1 plaintiffs' claim of arbitrary and unreasonable would fail  
2 based on the Pennsylvania DER assessments and studies rejecting  
3 that possibility as being unworkable, both water-wise and  
4 in terms of its hope for industry or population growth  
5 patterns to diminish the effect on consumption of water.  
6 Plaintiffs argue, as well, that the Corps or DRBC did not  
7 consider the Schuylkill River or upstream Schuylkill River  
8 storage as an alternative to taking out of the Delaware River.  
9 Again, the record shows that there was consideration by DRBC  
10 and Pennsylvania DER of upstream storage possibilities, along  
11 with PECO, as well as the availability of water at times  
12 required by the Limerick operation from the Schuylkill and  
13 those alternatives were rejected.

14           With respect to the Schuylkill in terms of  
15 temperature of the water or low flows or adverse environmental  
16 conditions which would arise from a diversion, now, I do not  
17 find as a matter of law that the Corps was obligated to do  
18 an independent study of every matter that might have been  
19 raised by the plaintiffs. The Corps was entitled to review,  
20 to consider the source of the liability, the measurements and  
21 its own experience in evaluating information developed by  
22 others, whether it was the NWRA or the DRBC or PECO. A  
23 review of the administrative record shows that information  
24 from these various sources was in the file available to the  
25 Corps and encompassed in its findings. Perhaps not in detail,

1 but sufficiently so, as to persuade this Court that it would  
2 be erroneous to conclude that the Corps acted unreasonably or  
3 arbitrary and capriciously.

4 With respect to the DRBC, the plaintiffs' claims  
5 against the Corps overlap, but to the extent that they do,  
6 any discussion with respect to the DRBC will be equally  
7 applicable to the Corps. With respect to the Corps, I find  
8 that it's actions on the state of this record satisfy the  
9 reasonableness test. Because the DRBC entertained and  
10 specifically treated the plaintiffs' petition for reconsideration,  
11 one could analogize that to affording the plaintiffs a hearing.

12 Therefore, the standard of review in that  
13 instance would appear to be the arbitrary and capricious  
14 standard as opposed to the reasonableness standard. The  
15 arbitrary and capricious standard is usually accorded to a  
16 reviewing agency in decisions where there has been an  
17 administrative hearing. The reasonableness standard may be  
18 more appropriate in reviewing agency action that was taken  
19 not pursuant to a hearing or after a hearing or for  
20 promulgation of a regulation. In reviewing the assumed  
21 claim against the DRBC, I must assume that the claim is  
22 being asserted under the Administrative Procedure Act or  
23 under -- you tell me, Mr. Sugarman. Under what statute or  
24 regulation are you proceeding as to the DRBC?

25 MR. SUGARMAN: It's under common law, Your

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1 Honor.

2 MR. GOLDBERG: Your Honor, if I may, the U.S.  
3 Administrative Procedure Act specifically of the DRBC's  
4 compact is not applicable to it and that fact is so noted in  
5 Judge VanArtsdalen's opinion. So, we are not governed by that  
6 procedure specifically.

7 THE COURT: All right. I will look at the  
8 claim against the DRBC in terms of whether or not the DRBC  
9 acted reasonably or arbitrarily and capriciously, because I  
10 am satisfied that under those tests, no matter how the  
11 plaintiffs might be proceeding, injunctive relief is not  
12 appropriate. Judge VanArtsdalen found, and I agree, that the  
13 DRBC has particular expertise to which the Corps could defer  
14 to the DRBC as lead agency to determine all locations of  
15 water, the need for water and the management of the river.  
16 The Delaware River is a managed flow river. All agree. The  
17 DRBC has the exclusive responsibility for the management of  
18 this river and water in the basin. The thrust of plaintiffs'  
19 charges as to DRBC, is that given its analysis of river flows,  
20 that the 3000 CFS objective at Trenton is unreasonable and  
21 known to be a mirage by the DRBC for purposes of the Point  
22 Pleasant project.

23 In short, plaintiffs argue that DRBC acknowledges  
24 that there's not enough water in the river and that any  
25 diversions without augmented flows from dams or reservoirs

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1 to be constructed in the future, will be detrimental to  
2 marine life, to the fishing industry and all of the objectives  
3 with respect to salinity control, dissolved oxygen and the  
4 like.

5 The plaintiffs' arguments on this record  
6 overlook several important factors with respect to the level  
7 B studies, the salinity studies and the good faith  
8 negotiations. First, the level B study, that's not taking  
9 into consideration in its analysis that there would be no  
10 controls by PECO if the flows are below 3000 CFS in terms of  
11 future projections, nor the management ability of DRBC with  
12 respect to the withdrawal by NWRA in times of low flow, nor  
13 is there plaintiffs' evidence or argument which considered  
14 the fact that the level B report states, I believe, that  
15 given existing storage capacities, there is still 110 CFS  
16 available for allocation, nor does the plaintiffs' argument  
17 take into consideration that the diversion at Point Pleasant  
18 would result in consumptive loss of only 8 CFS. To equate  
19 the effects of withdrawal of 95 MGD with a consumptive loss  
20 of 95 MGD, is misleading.

21 DRBC has the responsibility to administer the  
22 river flows to meet the permanent application requirements  
23 and restrictions as well as one of the public needs served  
24 by the river.

25 Mr. McCoy's presentation basically was a

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1 challenge to DRBC or an attempted challenge to DRBC to fulfill  
2 its commitments; that is through good faith. This Court is  
3 not in a position from this record to place suspicion on the  
4 the ability of DRBC to manage the river nor would it be  
5 appropriate for this Court to in effect attempt the manage  
6 the river for the DRBC. It's management abilities with  
7 respect to PECO and NWRA would reasonably appear to give it  
8 the manageability to control the withdrawal of those  
9 applicants in accordance with the good faith negotiations  
10 results, whatever they may be, which as I understand it from  
11 the material reviewed will be to look at the drought of the  
12 '60's as the drought of record as a plateau, the record  
13 suggests that the drought of the '60's is recurrent on 100  
14 to 300 years as opposed to the drought of the '30's, that  
15 occurs maybe once every ten years.

16           Plaintiffs allege, among other things, that  
17 the DRBC has already put into effect the recommendations  
18 from the good faith on negotiations with respect to the  
19 draw down of water from New York storage unit and hence,  
20 argues the plaintiffs their must be a bad faith attempt  
21 undertaking to ramrod into effect all the other recommendations,  
22 including a relaxation of the salinity objectives.

23           The record shows, however, that the good faith  
24 negotiation recommendations are subject to public hearing and  
25 comment and that is an ongoing process, and hence, there is



1 no room for this Court to find, on this record, that there  
2 has been a relaxation in fact of the salinity objective.

3 This Court is not the proper forum for an  
4 attack on the proposed salinity level, if there is any change,  
5 that should be done through the proper administrative procedures  
6 available to plaintiffs or others through the DRBC.

7 I have reviewed that the plaintiffs' objections  
8 raised to the DRBC and the responses to each. In light of  
9 the record before the DRBC or that as considered by the DRBC  
10 through its own contractors or supplied through studies  
11 contracted for through the NWRA. I do not find any reason  
12 to conclude that in denying the plaintiffs' petition for  
13 reconsideration, the DRBC acted arbitrarily, capriciously or  
14 unreasonably.

15 I could go through each of these in terms of  
16 the objections and the responses on this record but I will  
17 not.

18 I have studied the objections and I have  
19 studied the responses and found in the record support for the  
20 responses.

21 Based upon my independent findings and  
22 discussion here, the Court adopts and incorporates in this  
23 bench opinion the following proposed findings of facts as  
24 prepared by NWRA, because they are consistent with the Court's  
25 foregoing findings.

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1           The Court adopts 1 through 25; 27 through 40,  
2 those are background historical as to which there should be  
3 no objection.

4           41 through 65. 66 through 76. 77 through 82.  
5 83 through 116. 117 through 134. 135 through 147. 148  
6 through 150.

7           I find that those findings of facts are  
8 supported by the record evidence available to the Corps and  
9 the DRBC.

10           Plaintiffs final argument with respect to all  
11 of the agency defendants and NWRA and PECO is that there was  
12 a commitment to the Point Pleasant location such that the  
13 Corps merely rubber stamped the desire of the NWRA and PECO  
14 to use the Point Pleasant site because it was titled to  
15 NWRA and that thereafter all of the efforts of the Corps  
16 amounted to no more than going through the motions and was  
17 not a good faith environmental assessment.

18           The plaintiffs suggest that the hiring or  
19 the contracting of Miss Mints was designed to result in a  
20 historical district whose boundaries would not include the  
21 bluff or the esthetic charm of the village as opposed to  
22 selecting the Bucks County Conservancy as advisor on the  
23 historic certification because or whereas the later had a  
24 broader sense of the boundaries of the historic district.

25           I find that the record shows that the Bucks

1 County Conservancy took the position that it was unavailable  
2 as a contractor to complete the project within 30 days, Miss  
3 Mintz was.

4 The plaintiffs argue that Miss Mintz did not  
5 consult with the Bucks County Conservancy.

6 It is apparent from the record that the Bucks  
7 County Conservancy did review and critique Mintz' report  
8 evaluation. The Court submitted to the Advisory Council both  
9 the Mintz report as well as the Bucks County Conservancy's  
10 critique comments of the Advisory Council had both Mintz'  
11 report and the Bucks County Conservancy's views as well as  
12 the views of the State Historical Preservation officer in  
13 determining the extent of the boundary of the historic  
14 district.

15 Plaintiffs argue that Colonel Baldwin refused  
16 to meet with representatives of Delaware on site. The  
17 record does not support the view of Colonel Baldwin as one who  
18 took the tact of avoiding contact with the public or with  
19 the plaintiffs; the record does show meetings with counsel  
20 of Delaware and Colonel Baldwin and Colonel Baldwin acting as  
21 a moderator on a public hearing of the project.

22 I do not regard, based upon what I reviewed  
23 in the record, the Corps' correspondence with the Fish and  
24 Wildlife Service as being arbitrary and capricious.

25 The Wildlife Service did not specify the bases

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1 of its objections to the project with any backup data. It's  
2 speculative positions did not raise any concerns not already  
3 addressed by the Corps.

4 Its request for information are puzzling, inasmuch  
5 as it had as much access to the DRBC information as did the  
6 Corps with respect to impact on biotics. Likewise, it had  
7 access to the NWRA material. It did not conduct any independent  
8 studies. The oxygen demand and segmentation appears to have  
9 been a factor considered by the DRBC and the NWRA in the  
10 dissolved oxygen studies in respect to the flows in the river.  
11 I do not observe that the Fish and Wildlife Service took the  
12 position in the case before Judge VanArtsdalen that the  
13 project was bad, but did not raise any issue then which was  
14 not considered and studied to Judge VanArtsdalen's satisfaction  
15 by the Corps.

16 As Judge VanArtsdalen found there, just because  
17 one agency has a difference of mind with the permitting  
18 agency, is not a basis for saying that an environmental  
19 impact statement is required. In considering whether or not  
20 the plaintiffs have borne their burden of proving entitlement  
21 to injunctive relief, the Court must consider whether or not  
22 the plaintiffs will suffer irreparable harm if relief is not  
23 granted, or whether the defendants will be harmed if relief  
24 is granted, whether the public, generally, will be harmed if  
25 relief is granted and whether the plaintiffs are likely to

1 prevail on the merits of the claim.

2 I have found that considering the evidence  
3 before me, that the plaintiffs have not shown that they are  
4 likely to prevail on the merits of the claim. I have  
5 considered whether or not the construction in the Delaware  
6 River or environs should be enjoined until such time as the  
7 NRC acts or the Corps acts upon the rechannelization project  
8 in terms of permitting or not. The PUC has determined  
9 Limerick I's construction is in the best interest of the  
10 public and it has directed that PECO complete that construc-  
11 tion at the earliest possible time consistent with public  
12 safety. The requirements placed upon the applicant NWRA by  
13 the Pennsylvania DER is to complete all construction by the  
14 end of 1984. The work in the river has to take place within  
15 a specified time during any winter, reducing the period of  
16 time that can be devoted to construction and with construction  
17 with deliberateness, with a view towards public safety and  
18 compliance with the minimization of loss of water in transport.  
19 The DRBC has determined a need for water in Bucks and  
20 Montgomery Counties, based upon the experience in 1980 and  
21 1981 of water problems in those areas with wells running dry.

22 Balancing the harm that would occur to the  
23 public if the project is not available mechanically for the  
24 supply of water to Delaware and Montgomery Counties through  
25 NWRA to supplement the well water and considering the harm to

1 the public if the Limerick I is not available for operation  
2 on time because of the lack of completion of the mechanical  
3 project, versus the harm to the river, to the canal, to the  
4 environs, including the bluff, I find that on balance, the  
5 public would suffer more harm if the project presently is  
6 enjoined than if it continues. One, there is no harm to  
7 the river presently if there is construction. Two, the work  
8 under the canal will benefit the canal in terms of its  
9 ultimate strength, according to the Pennsylvania Authorities.  
10 Three, there is an architect available there and there are  
11 procedures outlined for the photographing and replacement of  
12 each aspect of the canal dirt or stones removed. The piping  
13 is intended to be underground. The effect on the wetlands  
14 will be minimal and of no significant impact and that really  
15 has not been pressed as an issue here and the harm to the  
16 bluff with blasting will be subject to the same conditions  
17 as blasting in the district. The pipes will be underground  
18 and covered. I agree with plaintiffs that if they have shown  
19 that there was a significant environmental impact that has  
20 been swept under the rug, then, that would be sufficient to  
21 show irreparable harm.

22 Here, it is not enough to say, well, the NRC  
23 has not acted and Limerick might not operate. There is an  
24 independent applicant, NWRA, whose needs have independent  
25 justification through the DRNC.

1 Are there any points any counsel believe now  
2 the Court failed to consider in its opinion?

3 MR. SUGARMAN: I am not able at the moment to  
4 think of any point which the Court has failed to consider.  
5 I did note some concerns that I had with respect to some of  
6 the Court's statements, interpretations and so forth.

7 I don't know if Your Honor means to encompass  
8 that within your question.

9 THE COURT: Well, concerns you can argue later.  
10 If I misstated some fact, you should bring it to my attention.

11 MR. SUGARMAN: Yes, that's what I really meant,  
12 Your Honor.

13 If I may, the Court indicated that the Historic  
14 Preservation Act has a provision for notice before suit was  
15 filed and I don't have the statute with me, but I am not  
16 familiar with any such provision. The same with respect to  
17 the River and Harbors Acts. I am not familiar with any  
18 provisions in either of those statutes for public notice.

19 With respect to the Clean Water Act, because  
20 I didn't rely on it for a preliminary injunction, I didn't  
21 put it in evidence, but we did in fact give notice to file  
22 a citizen's suit action with respect to the DER actions under  
23 the Clean Water Act. The one that we gave notice on was the  
24 Department's determination not to require a permit for the  
25 discharge into the Meshaminy North Branch. Your Honor stated

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1 that we conceded that the water quality of the Delaware River  
2 is such that it won't hurt the Perkiomen and we don't concede  
3 that.

4 THE COURT: Well, it doesn't make any  
5 difference. I have really not assumed jurisdiction over the  
6 claim.

7 MR. SUGARMAN: I understand that. The same  
8 with respect to best applicable technology with respect to  
9 the intake. We concede, if you will, arguendo, that the  
10 design is BAT, but we do not concede that the location is and  
11 the statute relates to both location and design.

12 THE COURT: Well, all right, I did find here  
13 that the location, considering the design, is not unreasonable.

14 MR. SUGARMAN: Your Honor, also in that area,  
15 and maybe this maybe is an area of omission, did not refer to  
16 the fact that the documents reflect that one of the considerations  
17 in the location of the intake was to avoid crossing the state  
18 line into New Jersey.

19 I don't know if Your Honor deliberately  
20 decided -- that you did not intend to refer to that.

21 THE COURT: Well, I read that as a possible  
22 concern, but what was important was that the design, plus  
23 the location had objective support for the conclusion that  
24 there would be no significant environmental impact. In fact,  
25 largely because of the design, the location became less a

1 problem.

2 I will not get into the NRC materials, but I  
3 am satisfied that it would be unfair to say that the location  
4 of the pipe didn't go 255, because of New Jersey. I am  
5 satisfied that the record shows it didn't go to 255 because  
6 it was thought reasonable and sufficient to have it go to  
7 245, considering the design of the intake and the location of  
8 the intake pipes.

9 MR. SUGARMAN: Another matter that the Court  
10 didn't refer to was the fact that the Corps refused to  
11 secure or consider or to abide by and await the information  
12 that was being developed in the preliminary hearings before  
13 the NRC prior to issuing its permit, although we had informed  
14 them of the intention of the NRC to hold those hearings and  
15 they were otherwise aware of them. The Corps --

16 THE COURT: Well, I think I covered that by  
17 saying there was no requirement on the Corps by the statute  
18 of regulations to await the permit decision of any other  
19 agency.

20 I might say there has been no record  
21 determination that there has been a denial of a permit by any  
22 permitting agency.

23 MR. SUGARMAN: I think there's some confusion  
24 as to what happened with respect to the historic -- with  
25 respect to the national historic landmark. It is our position

1 that Section 110(f) relates only to the national historic  
2 landmark and not to the historic district and that it was not  
3 the designation of the district that created the duty to  
4 minimize harm, but rather the statutory amendment.  
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1 THE COURT: With respect to the canal?

2 MR. SUGARMAN: Yes, sir. Well, the statutory  
3 amendment was general with respect to all landmarks  
4 and it, of course, referred specifically to the, as we say,  
5 I don't think there is any dispute about it.

6 MS. SIEGEL: The canal is the only landmark.

7 MR. SUGARMAN: The statute refers only to  
8 landmarks.

9 THE COURT: I understand that. I gave you  
10 the benefit of the doubt, I suppose, since the canal had  
11 not been crossed at any point of taking from the Delaware.

12 I thought you had argued here that this  
13 particular point of the canal --

14 MR. SUGARMAN: Yes, sir.

15 THE COURT: -- was so pretty but it's the  
16 canal which is the historic landmark.

17 MR. SUGARMAN: That is right, sir.

18 THE COURT: I assumed that you were arguing  
19 the duty really applied to the district so, I think I treated  
20 it.

21 MR. SUGARMAN: The point I was getting to,  
22 your Honor, is that the Corps, your Honor, says that the  
23 Corps was entitled to rely on the DRBC. I am not sure if  
24 your Honor meant in that way to dispose of our argument that  
25 A, the DRBC specifically deferred on the issue of historic

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1 compliance to the Corps, and, if your Honor want to say  
2 that in those circumstances the Corps was still entitled  
3 to rely on the DRBC determination as to interpret the DRBC  
4 determination as requiring or as determining where on the  
5 Delaware River the water should be drawn and then relying  
6 on that, even though a statute had been passed and if that is  
7 the case then --

8 THE COURT: I don't understand what you  
9 are saying.

10 The Corps, I found had a right to rely upon  
11 the DRBC in determining by its Section 3.8 approval that  
12 Point Pleasant was the place for the intake of water to  
13 facilitate the delivery of water to Bucks and Montgomery  
14 Counties and the Corps had a right to find reasonably that  
15 that determination was conclusive.

16 Actually it was probably conclusive in that  
17 there had been a long study of that project, even through a  
18 final environmental impact statement, reviewed by the  
19 Third Circuit with respect to the location and the location  
20 considering that the historic landmark would have to be  
21 crossed. And that there are archaeological sites and that  
22 indian relics possible in the area and that practical steps  
23 should be taken to minimize the harm to the canal, to the  
24 historic site, including the village district.

25 MR. SUGARMAN: The only point I am making,

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1 your Honor, the DRBC made all of those decisions without  
2 taking into account, without complying with the National  
3 Historic Policy Act, the National Historic Preservation Act,  
4 the DRBC passed all of those issues to the Corps of Engineers,  
5 so, what the Court is in effect holding, therefore and I  
6 just wanted, I guess to clarify that your Honor is aware that  
7 the Court is in effect holding that the DRBC could make a  
8 final decision on compliance with Section 110 which determined  
9 compliance with Section 110(f) while at the same time passing  
10 that responsibility to the Corps of Engineers.

11 THE COURT: I didn't say that. I don't agree  
12 with you that 110(f) requires that there be a determination  
13 by either the Corps or by the DRBC of feasible and practical  
14 alternate routes as in placement of highways through parks.

15 The obligation is, once a historic landmark  
16 is confronted, that all steps be taken to minimize the  
17 harm and the Corps found that the canal had to be crossed.

18 MR. SUGARMAN: But, your Honor, what we  
19 are talking about then is --

20 THE COURT: As well as the DRBC. The issue  
21 then was how to minimize the harm to the landmark.

22 MR. SUGARMAN: What we are talking about is  
23 assuming that the landmark has to be crossed, the selection  
24 of the location to cross the landmark that would minimize  
25 harm.

1 THE COURT: To what, the canal?

2 MR. SUGARMAN: To the canal, right.

3 THE COURT: Well, the canal is important  
4 wherever it goes.

5 MR. SUGARMAN: The harm might be less at  
6 different locations.

7 THE COURT: I will say this. At this point  
8 on this record, this is a preliminary injunction hearing,  
9 not a final hearing, I have determined that considering  
10 your concern as raised, the presumption of regularity according  
11 to the agencies is sufficient to meet that.

12 MR. SUGARMAN: To meet what, your Honor?

13 THE COURT: Your concern, you have raised a  
14 concern that there might be a better place along the canal  
15 for it, there is no evidence that there is.

16 MR. SUGARMAN: Your Honor, there was evidence  
17 before the Corps that there would be other locations that  
18 would be better. There was evidence in the sense that the  
19 -- there was evidence that the point was made to the Corps.

20 THE COURT: The issue is not just the impact  
21 on the canal but the impact on the delivery system of water,  
22 you know, it might be, you might go 57 miles north and come  
23 back, but you still have to consider what it means in terms  
24 of laying pipe and so forth along 57 miles to get to the  
25 particular reservoir. As it turns out going this route is

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1 Only three-tenths of a mile.

2 MR. SUGARMAN: We are not arguing, your  
3 Honor, that the --

4 THE COURT: 2.3 miles, whatever it is.

5 MR. SUGARMAN: We are not arguing that the  
6 consideration of minimizing impact to the landmark is the  
7 only consideration that the agency is allowed to take into  
8 account.

9 We recognize that there can be other con-  
10 siderations under that statute and as your Honor indicated,  
11 that your Honor is interpreting the statute.

12 What we are saying, there is no evidence that  
13 any other locations along the route were ever considered in  
14 order to determine whether they would minimize harm to the  
15 landmark and whether they would be otherwise acceptable.  
16 There is no -- and, your Honor, I just want to make sure that  
17 your Honor was intending to hold that didn't have to be done,  
18 which is what I understood your Honor to say.

19 THE COURT: I am holding there does not have  
20 to be a determination in the findings that there was some  
21 other feasible or practical route; that once the historical  
22 landmark is confronted, the agency must consider all  
23 possible means of minimizing the harm to the landmark.

24 MR. SUGARMAN: Does that include other  
25 locations, other ways to cross the canal, other places along

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1 the 57 miles?

2 THE COURT: It could, but in my opinion  
3 it doesn't have to.

4 MR. SUGARMAN: And, your Honor, further holding  
5 that the Corps can rely on the DRBC on that point, even though  
6 the DRBC did not take into account minimizing harm to the  
7 landmark under that statute?

8 THE COURT: I will find that the DRBC did  
9 take into consideration minimization of harm to the canal  
10 at that point, even before there was a deferral to the  
11 Corps.

12 There is record evidence showing there were  
13 plans minimizing the harm and determination and findings  
14 that no significant harm would occur to the canal from the  
15 procedures proposed by NWRA were carried out.

16 So, I cannot say that the DRBC deferred.

17 Moreover, Section 111(f) was not in effect.

18 MR. SUGARMAN: Exactly.

19 THE COURT: But, nevertheless, I am satisfied  
20 in this record that the DRBC treated the canal as a historic  
21 landmark.

22 I am also satisfied on the record that the  
23 DRBC choice of location was entitled to great deference for  
24 the intake, considering the plan for the overall project.  
25 For example, the plan for the water to reenter the Parklomen

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1 Creek, so as to enter into the Delaware River at important  
2 points for control of salinity.

3 So, that's what I meant by saying there is a  
4 presumption of regularity with respect to DRBC's consideration  
5 of the point of location of the intake.

6 There's also the consideration of where  
7 Shortnosed Sturgeon are located in the river.

8 MR. SUGARMAN: By the DRBC, your Honor?

9 THE COURT: No, I am just saying generally.

10 I mean, the Corps was aware that Shortnosed  
11 Sturgeon had been caught ten miles up river and when I say  
12 to you that environmentally and need-wise, the DRBC determina-  
13 tion of intake is entitled to great deference, such that  
14 the Corps was entitled to conclude that the intake had to be  
15 in the Point Pleasant area and was not at liberty to in  
16 effect assume the role of DRBC in determining the water  
17 intake location.

18 MR. SUGARMAN: Is your Honor then making  
19 any holding concerning the responsibility of DRBC to review  
20 its prior determination in the light of the statutory change?

21 THE COURT: The DRBC deferred to the Corps  
22 to make sure that it complied, the Corps complied, to be the  
23 lead agency on historical landmark impact minimization and  
24 I am finding that based upon the Corps' determination of  
25 minimization, there was no need for the DRBC to reconsider

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1 its grant.

2 MR. SUGARMAN: Thank you, your Honor. That  
3 clarifies it.

4 With respect to the bluff, your Honor, I  
5 believe --

6 THE COURT: I got a lot of bluffs out of  
7 your brief, that's why I referred to the brief, I mean the  
8 bluff, I am not saying that you are bluffing, but you made  
9 a big point in your brief that the bluff is somehow outside  
10 of the district and is going to be harmed.

11 MR. SUGARMAN: Yes, sir.

12 Well, yes and no. We did talk a lot about  
13 the bluff or a fair amount about it, but I believe we  
14 said in our brief and incidentally that the record shows that  
15 the bluff is in the historic district, and not outside of it.

16 THE COURT: Outside or inside, the Memorandum  
17 of Agreement accords it the same protection as it was inside.

18 MR. SUGARMAN: Sir, I think I explained and  
19 I offered testimony to the Court, to have Miss Auerbach  
20 to back me up, that I was present at a meeting and she was  
21 present at a meeting where the Corps of Engineers specifically  
22 they would not consider the bluff, would not define the  
23 project as including the bluff and would not address them-  
24 selves to any impact on the bluff and they would not and did  
25 not.

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1 THE COURT: My reading of the agreement is  
2 that the bluff is to be accorded protection as though it  
3 were in the district, is consistent with the representations  
4 of PECO and NWRA and the Corps here at this hearing and that  
5 is, that the pipes will be underground and covered and subject  
6 to the review of the powers that be to that agreement to make  
7 sure there is conformity with the aesthetic objections and  
8 landscaping objectives to blend as much as possible into the  
9 existing environment.

10 MR. SUGARMAN: Well, I think, your Honor, I  
11 needn't belabor the point, since your Honor has made his  
12 determination on it.

13 I just wanted to call the Court's attention  
14 to that specific fact, on that point, that the historic  
15 district, I believe does include the bluff, and that the  
16 Corps in its documents, to my understanding of those  
17 documents, did not afford any protection to the areas across  
18 River Road, which means, including the bluff. They defined  
19 their area of jurisdiction as running only to River Road.

20 THE COURT: Well, the Memorandum of Agreement  
21 though places the Advisory Council in a position, as well  
22 as the State Historical Preservation Officer, in a position  
23 to review all of the construction impacts affecting the  
24 district, as well as the canal.

25 MR. SUGARMAN: I think, your Honor, that the

1 agreement and other counsel, I don't have the agreement with  
2 me, and I haven't looked at it -- I have looked at it from  
3 that point of view, but I don't want to say, in response to  
4 the Court's expression --

5 THE COURT: Again, I have given you what  
6 appears to be a reasonable interpretation.

7 MR. SUGARMAN: Right.

8 THE COURT: Based upon my reading and the  
9 representation of the applicants and the permitting party.

10 MR. SUGARMAN: As I say, there is no reason  
11 in belaboring the point.

12 THE COURT: Further, there is no agency  
13 determination with respect to the Advisory Council and it has  
14 not failed to act or failed to carry out some non-discretionary  
15 function and, so, it seems to me, that it may be appropriate,  
16 if in effect the pipes are put above ground, or not covered,  
17 to complain, but right now, it seems to me that no one is  
18 taking the position that you are taking except you.

19 MR. SUGARMAN: Well, your Honor, we take the  
20 position that having -- the scaring of that bluff, by clearing  
21 it and keeping it cleared, and blasting through the bluff,  
22 to put -- they will never be able to restore the rock base, and  
23 they will not revegetate it the way it is, and it will not  
24 be a natural rock face, as it is now, and that will occur  
25 inevitably as a result of the construction, and we have taken

1 that position all along and I agree with you. And, it is  
2 true that the other agencies haven't -- were not and it's  
3 true, that the agencies have not taken the position that we  
4 have, and that's why we are here.

5 Well, the only other point I would make, in  
6 response to your Honor's question is that I am not sure as  
7 I listen to your Honor, whether you are aware that the DER  
8 assessment is under appeal as part of the permit appeals that  
9 we have filed with the state.

10 THE COURT: I am.

11 MR. SUGARMAN: I wasn't sure about that.

12 THE COURT: That's why you shouldn't be here  
13 on that claim.

14 MR. SUGARMAN: Well, your Honor, we are only  
15 trying to maintain the status quo until these things can be  
16 resolved and we did not select the dates for these things to  
17 happen, and the NWRA and PECO could have applied for the  
18 permits a long time ago and by doing it in the way that they  
19 did, the permits came out after they had already advertised  
20 for bids in the case of the Corps permit, the DER permits came  
21 out just about the date that they went to bid, by waiting  
22 that long, and by shortening the time that we could obtain  
23 final adjudications, they have put us and the Court in this  
24 short time frame situation. So, to say we shouldn't be here,  
25 your Honor when --



THE COURT: That's an operational consequence,  
and the facility is not operating, I mean, so you have plenty  
of time to have review before the --

/kt  
1 MR. SUGARMAN: That is correct, Your Honor,  
2 and the only problem is that some of the harms due in our  
3 view result from the inception of construction and we also  
4 are concerned that it would be too late to have an open-minded  
5 reassessment once construction is far advanced and they  
6 certainly --

7 THE COURT: Open-minded by whom?

8 MR. SUGARMAN: By the agencies involved.

9 THE COURT: Well, the harm that the  
10 environment faces presently is a disruption of the canal,  
11 the filling in of some areas and scarring for purposes of  
12 constructing, but even the construction plans are being held  
13 in terms of adverse impact to a minimum.

14 MR. SUGARMAN: Your Honor, that's their  
15 contention.

16 THE COURT: Well, the permit, for example, has  
17 a requirement that the dredging equipment be barged. So,  
18 I agree with you that there is a risk to the environment that  
19 there will be some temporary scarring and some of which may  
20 not be put back in perfect order, but on balance, the risk  
21 of harm to the environment where there is no significant --  
22 no projection of significant, permanent disfigurement to the  
23 canal or to the surrounding environment or to the esthetics  
24 of the area, do not outweigh the risk of great public  
25 inconvenience if by virtue of delay, the project is not

ready for operation to supply water to various sources.

MR. SUGARMAN: On that point, Your Honor, there is no evidence in the record of any date of inception of NWRA service, that is, public water supply service and there is no -- and the PECO witness on irreparable harm admitted that PECO has not even looked at alternative water supply sources that would enable them to operate Limerick unit one.

THE COURT: My understanding is that the water need in Bucks and Montgomery Counties is ASP and that while there has been no sale of water by contract, no water can be sold until other permits are obtained by the NWRA.

MR. SUGARMAN: My point, Your Honor, is that they have not -- the record is silent as to when they can -- when they can institute service and -- but the record does not show that they need a water treatment plant in order to do that.

THE COURT: Well, that may be so, but still --

MR. SUGARMAN: What I am saying, Your Honor --

THE COURT: In terms of balancing the harm to the environment, based upon the record, versus the risk of harm to the completed objectives of the DRBC in terms of supplying adequate water to the basin, I find that injunctive relief is not appropriate.

MR. SUGARMAN: My point, Your Honor, on that,

1 and I think it goes to the -- the DRBC desired to provide  
2 water to Bucks and Montgomery Counties. That's not controlled  
3 by the approval of this project. It's controlled as well  
4 independently by NWRA's ability to complete and get permitted  
5 and get into operation and water treatment plant and Your  
6 Honor may recall that NWRA provided no testimony that  
7 indicated in any way that it would be able to institute  
8 service upon completion of this project or put the other way,  
9 that any delay in the construction in Point Pleasant would  
10 delay them in instituting public water supply service. They  
11 provided no testimony to that effect, whatsoever.

12 THE COURT: I am satisfied on the record that  
13 I have balanced the equities.

14 I considered the PECO equities and the monetary  
15 loss there as projected is credible in terms of delay costs.

16 MR. SUGARMAN: But, they provided no evidence  
17 that they could not get water from another source.

18 THE COURT: I am satisfied that given the  
19 state of the record that the irreparable harm issue has to be  
20 measured from what the expectation of PECO is and that is for  
21 the completion of this project by the particular date and we  
22 are not in any NEPA considerations, but rather, in irreparable  
23 harm considerations and those are measured by what the  
24 applicant has reason to expect, given the permits that have  
25 been issued.

1 Do you have anything else?

2 MR. SUGARMAN: No, sir; only -- may I get  
3 clarification on Your Honor's disposition of the -- of our  
4 claims against the agencies? For example, under the River and  
5 Harbors Act, joined with the Administrative Procedure Act,  
6 Your Honor's indication that the Court has no jurisdiction,  
7 was that intended to relate to our claims against the Corps  
8 of Engineers for issuing the permit in which we say that they  
9 acted arbitrarily and capriciously in violation of the River  
10 and Harbors Acts under the standards of the APA?

11 Is the Court meaning --

12 THE COURT: There's no implied right of action.

13 MR. SUGARMAN: We agree there's no implied  
14 right of action.

15 THE COURT: That's what I intended to say.

16 MR. SUGARMAN: Insofar as they come in under  
17 the APA, Your Honor is saying there is a cause of action?

18 THE COURT: Yes, and with respect to that, I  
19 do not see that you made out a prima facie case of violation  
20 of procedure by the Corps with respect to the Harbors Act.  
21 You are really claiming that the Pennsylvania authorities  
22 didn't get the right permits.

23 MR. SUGARMAN: Pennsylvania authorities?

24 THE COURT: What do you claim the Corps didn't  
25 do with respect to Section 10?

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1 MR. SUGARMAN: They didn't give great views  
2 to the Fish and Wildlife Service as required by their  
3 regulations.

4 THE COURT: I found that they did.

5 MR. SUGARMAN: I meant in terms of a cause of  
6 action.

7 THE COURT: That's satisfies that. What other  
8 agency claim are you concerned about -- substantive claim,  
9 APA claim?

10 MR. SUGARMAN: Each of the federal agencies,  
11 the Historic -- the Advisory Council --

12 THE COURT: With respect to the Advisory Council,  
13 I found they entered an MOA and that satisfied that advice  
14 obligation under the regulations and under case law.

15 Further, there is no filed action by the  
16 Advisory Council. They have an ongoing administrative monitoring  
17 role. With respect to the National Marine Fishery Service,  
18 I found that they did take final action, to be sure, they  
19 found there would be no endangerment of the species in the  
20 river and no basis to say that the decision was arbitrary  
21 and capricious and moreover, there's continuing monitoring  
22 action by the agency. It has not abandoned and taken final  
23 action and say they will just write it off.

24 MR. SUGARMAN: One other question.

25 Under the archaeological work that was

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continuing and Your Honor was informed of last week and the week before, the on-site work has concluded. I am informed that the archaeologists under contract to the NWRA have given their -- it is their opinion that there is no need to hold up construction because of the archaeology, although, they found some significant archaeological material. They found there is a remains of an Indian house which is a rare find, but all that's going to be reported --

THE COURT: Just a minute. I do not want you to think that you are testifying.

MR. SUGARMAN: No.

THE COURT: If you have something that you want the Court to consider, you should submit it by way of evidence or affidavit in a final hearing.

MR. SUGARMAN: What I was going to ask Your Honor is, you indicated you would entertain a motion when the archaeological findings were complete and the findings have been made by the respective agencies, the state office and the federal office. I just wanted to clarify that that is still the case and that issue as Your Honor, I think said, was not ripe at the time we brought it out on this motion. I don't know if we would want to be filing a motion.

THE COURT: What I said just about an hour ago -- if you want to file an amended document or another claim, that is your right, but based upon this record, based



1 upon these contentions, I have made my findings and conclusions.

2 MR. SUGARMAN: I just wanted to clarify that.

3 Thank you.

4 THE COURT: I recognize, certainly, that each  
5 of the agencies has undertaken by virtue of the limitations  
6 on their permits or the memoranda agreements, enforceable  
7 undertakings and they can't act arbitrarily and capriciously  
8 with respect to the decisions on those agreements, but right  
9 now, until there is an assertion in a proper way, that there  
10 is an improper action, what has been done, satisfies the  
11 requirements of agency action.

12 MR. SUGARMAN: Thank you very much, sir.

13 MR. GOLDBERG: Your Honor, just one brief  
14 comment. Your Honor indicated that you were reserving the  
15 right to amend or extend your marks and in addition, that  
16 apparently, there will be some further proceedings before  
17 there is a final determination on the merits of this suit  
18 and you asked counsel about whether there were any factual  
19 materials or corrections to be made. I took notes, but I am  
20 not in a position to suggest to the Court any corrections or  
21 changes at this point, but after the transcript is available,  
22 if it appears that there are any factual points for the  
23 assistance of the Court that we could call to your attention,  
24 we would like to feel free to do that, so that can be  
25 incorporated into any final statement of the Court on this

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matter..

THE COURT: Anything that you find to be significant, you should bring it to my attention now. I will certainly correct anything that is obvious, whether it is legal or factual, because I do not know the intent of any party here.

There is a right of appeal from my decision and I do not want to take the position that while I am not enjoining construction, for example, the plaintiffs have to wait until I have entered a final order before considering appellate review. If you do have something in terms -- if you feel I have made a misstatement of the law, straighten me out my tomorrow and I will incorporate it and so there will be a final order, but I am satisfied that however the Court of Appeals looks at it, if it looks at it under whatever theory, it has to look at the factual review of the evidence submitted and the standard of review applied.

All right, anything else?

(No response.)

THE COURT: Thank you.

(Whereupon, Court was adjourned at 6:20 p.m.)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., et al. : CIVIL ACTION  
v. :  
ROGER M. BALDWIN, et al. : NO. 82-5115

FILED DEC 23 1982

BENCH OPINION CORRECTION SHEET

AND NOW, this 23rd day of December, 1982, it is here-  
by ORDERED that the following correction sheet shall be in-  
corporated into the court's bench opinion rendered in this  
matter on December 15, 1982.

1. P. 1438, line 4 - change "Section 110" to  
"Section 10".
2. P. 1439, line 7 - change "refusal" to "relief".
3. P. 1439, lines 9-11 - delete "the National His-  
toric Preservation Act," and "and the River and Harbors  
Act,". Insert "and" after "Act" on line 10.
4. P. 1439, line 15 - after "Harbors Act," add "see  
California v. Sierra Club, 451 U.S. 287 (1981), and,".
5. P. 1439, line 17 - after "Court" add "in Middle-  
sex City Sewerage Authority v. National Sea Clammers  
Association, 453 U.S. 1. (1981),".
6. P. 1439, line 24 - change "beliefs" to  
"briefs".

ENTERED: 12-28-82

CLERK OF COURT A-65

7. P. 1440, line 10 - after "case" add "619 F.2d 231 (3d Cir. 1980), cert. denied, 449 U.S. 1096 (1981),".
8. P. 1440, line 15 - change "agreed" to "aggrieved".
9. P. 1440, line 25 - change "study." to "statement."
10. P. 1443, line 20 - delete "have".
11. P. 1443, line 22 - change "the reasonableness" to "either".
12. P. 1444, line 1 - delete "a matter of record of".
13. P. 1444, line 8 - after "decision," add, 536 F. Supp. 26 (E.D. Pa. 1981), aff'd, 681 F.2d 805 (3d Cir. 1982)."
14. P. 1445, line 24-25 - change "Advisory Council on Historic Preservation" to "Keeper of the National Registry".
15. P. 1446, line 1 - add after "was", "determined to be."
16. P. 1446, line 9 - substitute "Corps," for "DRBC,".
17. P. 1446, line 13 - after "110(f)," add "of the National Historic Preservation Act,".

18. P. 1446, delete lines 15-16 - add "undertake to the maximum extent possible, such planning and actions as may be necessary to minimize the harm to national landmarks."

19. P. 1446, line 17 - delete "assert".

20. P. 1447, line 4 - change "channel," to "canal,".

21. P. 1447, line 11 - change "out" to "without".

22. P. 1447, line 24 - add "water" before "for".

23. P. 1448, line 7 - after "case," add "401 U.S. 402 (1971)."

24. P. 1448, line 11 - change "be" to "the".

25. P. 1448, delete line 17-18 and substitute "steps would minimize the harm to the historic landmark."

26. P. 1449, line 7 - change "appropriateness" to "appropriateness".

27. P. 1450, line 25 - add after "consumption," "assuming that the River flow is less than 3000 cfs."

28. P. 1451, line 1 - change "gages." to "gauges."

29. P. 1451, line 2 - delete "that".

30. P. 1451, line 7 - delete "or at" and "mouth".  
Add after "above", "Philadelphia and 50 percent through".

31. P. 1451, line 18 - delete "available to the Corps."

32. P. 1452, line 2 - delete "is"; line 13, substitute "is" for "are".

33. P. 1452, lines 14 and 15 - end sentences with "millimeters." and "fish."

34. P. 1453, line 8 - end sentence with "species."

35. P. 1453, line 9 - after "Commerce" add "(National Marine Fisheries Service)".

36. P. 1453, line 10 - substitute line 10 with "not endanger the species in the river. Further, it made a determination".

37. P. 1453, line 11 - add "a" after "constitute".

38. P. 1453, line 14 - end sentence with "flow."  
Substitute "to what" with "it was based on what".

39. P. 1455, line 21 - change "reasonable" to "reasonably".

41. P. 1455, line 22 - reverse order of words "engineering-wise", and "unsound".

42. P. 1455, line 25 - after "NWRA" substitute "has an" for "and".

43. P. 1456, line 14 - end sentence with "submission".

44. P. 1456, line 19 - delete "too".

45. P. 1456, line 24 - change "review" to "reviewed".

46. P. 1457, line 14 - change "at" to "that".

47. P. 1458, line 8 - add "water" after "taking".

48. P. 1458, line 12 - delete "and"; place period after "Schuykill"; line 13 - start next sentence "Those . . ." and connect with sentence in line 14, stopping at "diversion" on line 16; start next sentence "Now," line 16; p. 1458, line 20 - substitute "and the reliability of" for "of the liability,".

49. P. 1461, line 8 - end sentence after "study" and substitute "that's not taking" with "They do not take".

50. P. 1461, line 9 - substitute "in its" with "DRBC's".

51. P. 1461, line 10 - change "controls" to "withdrawals".

52. P. 1461, lines 12 and 16 - end sentences with "flow." and "allocation." respectively.

53. P. 1461, line 18 - add after "CFS," "assuming that the River flow is less than 3000 cfs."

54. P. 1462, line 12 - end sentence with "plateau."

55. P. 1462, line 18 - delete "on".

56. P. 1462, line 20 - change "their" to "there" and add "or" after "attempt".

57. P. 1464, line 23 - change "later" to "latter."

58. P. 1466, line 11 - delete "do not".

59. P. 1466, line 22 - change "suffere" to "suffer".



60. P. 1472, line 11 - delete "not been" and sub-  
stitute "to be".

61. P. 1477, line 14 - delete "from" and substitute  
"if". Line 17, change "Section 111(f)" to "Section 110(f)".

62. P. 1479, line 21 - add "stated" after "specif-  
ically".

63. P. 1481, line 20 - change "scaring" to "scar-  
ring".

64. P. 1482, line 22 - change "log," to "long,".

65. P. 1487, line 7 - change "That's" to "That".

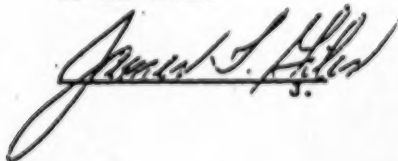
66. P. 1487, line 13 - change "filed" to "final".

67. P. 1488, line 7 - change "fine," to "find,".

68. P. 1490, line 13 - change "my" to "by".

The standard of review, scope of hearing and evidentiary rulings made during the course of the preliminary hearing, are incorporated herein by reference. The administrative record of the Corps, all of which was reviewed, is hereby marked and made "Court Exhibit 1."

BY THE COURT:

A handwritten signature in dark ink, appearing to read "James T. Miller", is written over a horizontal line.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RECEIVED  
DEC 15 1982  
SUGARMAN AND BERNHART

DEL-AWARE UNLIMITED, INC., et al.,

Plaintiffs

v.

Dkt. No. 82-5113

ROGER M. BALDWIN, et al.,

Defendants

NESHAMINY WATER RESOURCES AUTHORITY'S  
PROPOSED FINDINGS OF FACT

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., et al., :  
Plaintiffs :

v. :

CIVIL ACTION  
NO. 82-5115

BALDWIN, et al., :  
Defendants. :

NESHAMINY WATER RESOURCES AUTHORITY'S  
PROPOSED FINDINGS OF FACT

I. HISTORY OF PRIOR ACTIONS, ENVIRONMENTAL REVIEWS AND  
APPROVALS

1. A water study of the Neshaminy Creek Basin was undertaken under the co-sponsorship of the predecessor to Pennsylvania Department of Environmental Resources, the U.S. Soil Conservation Service, Bucks County and Montgomery County. As a result, the Neshaminy Creek resource plan was developed. This study included recommendations to construct, inter alia, a Point Pleasant Pumping Station, a taking point for water supply purposes at Chalfont, and ten dam structures along the Neshaminy Creek, including the dam that has created Lake Galina. (NWRA Exhibit 13, p. 14).

2. On October 26, 1966, the Watershed Project for Neshaminy Creek was approved by the Delaware River Basin Commission and was added to the Delaware River Basin Comprehensive Plan. The decision was supplemented on January 25, 1967, by adding the entire multi-purpose project as described in the 1966 Water Resources Study to the DRBC Comprehensive Plan. (Neshaminy Creek Watershed Project, Bucks and Montgomery County, Pennsylvania, DRBC Docket No. D-65-76CP and Bucks and Montgomery County Commissioners, Neshaminy Creek Water Shed Project, Bucks and Montgomery Countys, Pennsylvania, DRBC Docket No. D-65-76CP(2), NWRA Exhibit 13, pp. 14-15).

3. On December 8, 1970, the Pennsylvania Water and Power Resources Board issued to Bucks County Water Allocation Permit No. WA-649 authorizing the withdrawal of Delaware River water for public water supply purposes. (NWRA Exhibit 13, p. 15).

4. On March 17, 1971, the DRBC amended its Comprehensive Plan to include an enlarged Point Pleasant Pumping Station to supply additional amounts of water for public water supply and, in addition, to provide water to PECO for Limerick. This amendment was as a result of a feasibility study prepared in 1970 at the request of DRBC. (NWRA Exhibit 13, pp. 15-16).

5. In February, 1973, DRBC completed and submitted to the counsel on Environmental Quality the Environmental Impact Statement on the Point Pleasant Diversion Plan, a project which included the withdrawal of up to 150 million gallons per day

(mgd) of water from the Delaware River at Point Pleasant to be conveyed to the Chalfont Water Treatment Plant and to Limerick. (Final Environmental Impact Statement on the Point Pleasant Diversion Plan, Bucks and Montgomery Countys, Pennsylvania, NWRA Exhibit 13, p. 16).

6. DRBC concluded in its Final Environmental Impact Statement that the proposed project would be beneficial to the Neshaminy and Perkiomen Watersheds and not detrimental to the Delaware River Basin. (NWRA Exhibit 13, p. 16).

7. In January, 1977, Bucks County completed a study of water supply needs of Central Bucks County and the alternatives for meeting those needs. The study concluded that the Neshaminy Water Supply System was the best overall. (Central Bucks County Water Supply Study, NWRA Exhibit 13, p. 16).

8. In February, 1977, Montgomery County completed a study of the water supply needs in Central Montgomery County and the alternatives for meeting those needs. Said study concluded that the Neshaminy Water Supply System was the best overall. (Water Supply Study for Montgomery County, NWRA Exhibit 13, p. 16).

9. In March, 1977, the Delaware Valley Regional Planning Commission completed its Interim Population Projection Report including, therein, projections for the population by the year 2000 in Central Bucks and Central Montgomery Countys. (Interim Projections Report for Bucks, Chester, Delaware,

Montgomery, Philadelphia Countys, Pennsylvania, NWRA Exhibit 13, p. 16).

10. In conjunction with the results of the three last-referenced reports, NWRA initiated the preparation of its Environmental Report which included re-evaluation of the Neshaminy Water Supply Project as described in the DRBC Comprehensive Plan and an evaluation of the information contained in the DRBC Environmental Impact Statement on the Point Pleasant Diversion Plan. In conjunction with the preparation of this Report, NWRA drew on the expertise of aquatic biologists, environmental engineers, archeologists and other consultants. (NWRA Exhibit 13, p. 17).

11. On the basis of the above-referenced studies and reports, the designed capacity of the Treatment Plant at Chalfont was selected to remain at 20 mgd for the initial installation; however, the ultimate capacity of the Treatment Plant was reduced from 80 to 40 mgd to meet the supplemental water needs of the service area of Central Bucks and Montgomery Countys. (NWRA Exhibit 13, p. 16).

12. In September of 1978, NWRA submitted to the Department of Environmental Resources an application for a modification to the Water Allocation Permit along with an updated report. The report concluded that there is a need for less supplemental water supply than originally projected in 1970. (NWRA Exhibit 13, p. 17).

13. In November, 1978, the Department of Environmental Resources issued Water Allocation Permit No.



0978601 to NWRA, superseding the originally issued Water Allocation Permit. This Permit was issued together with an exhaustive report prepared by the Department of Environmental Resources supporting and justifying the issuance of the new permit. The new permit granted NWRA, under certain conditions, the right to withdraw water from the Delaware River at Point Pleasant as well as from Pine Run and North Branch of Neshaminy Creek to provide up to 40 mgd of potable water to Central Bucks and Central Montgomery Countys. This potable water would supplement the existing limited groundwater supplies. (DER Water Allocation Report, November 1, 1978, NWRA Exhibit 13, p. 17).

14. Concurrent with all of the above-mentioned reviews of the basic Point Pleasant Project and Neshaminy Water Supply System, the Atomic Energy Commission completed the preparation of its Final Environmental Impact Statement on the Limerick Generating Station which incorporates, by reference, the Environmental Impact Statement prepared by the DRBC. (Final Environmental Impact Statement relating to the proposed Limerick Generating Stations, Units I and II, Philadelphia Electric Company, NWRA Exhibit 13, pp. 17-18).

15. Based on the Final Environmental Impact Statement prepared by the Atomic Energy Commission, the previous Environmental Impact Statement prepared by the DRBC, and the records compiled at public hearings held before the Atomic Safety and Licensing Board and the Appeal Board of the Nuclear Regulatory Commission, the Nuclear Regulatory Commission issued

to Philadelphia Electric Company construction permits for the Limerick Plant in March, 1975. (In the Matter of Philadelphia Electric Company (Limerick Generating Station, Units I and II), Docket Nos. 50-352 and 50-353 (March 19, 1975), NWRA Exhibit 13, p. 18).

16. An appeal was taken to the Third Circuit Court of Appeals and they decided, inter alia, that the Environmental Impact Statement prepared by the Atomic Energy Commission and DRBC met the requirements of the National Environmental Policy Act. (Environmental Coalition of Nuclear Power, et al. v. NRC, Docket No. 75-1421 (November 12, 1975), NWRA Exhibit 13, pp. 18-19).

17. In February 1979, NWRA issued its draft Environmental Report. (NWRA Exhibit 14).

18. On May 30, 1979, NWRA held public hearings on its draft Environmental Report. (NWRA Exhibit 14).

19. On July 5, 1979, NWRA filed its application for Section 3.8 approval under the Delaware River Basin Interstate Compact with DRBC which was accompanied by its Environmental Report, the transcript of the Public Hearing of May 30, 1979, and a report prepared by NWRA responding to the comments received at the May 30, 1979 Public Hearing. (NWRA Exhibit 13, p. 20).

20. When NWRA filed its application for Section 3.8 approval with DRBC, DRBC had available to it three Final Environmental Impact Statements, together with all the supporting data. They were: (1) "Point Pleasant Diversion

Plan, Bucks and Montgomery Countys," prepared by DRBC in 1973; (2) "Limerick Generating Station, Units I and II," prepared by the Atomic Energy Commission in 1973; and (3) "Neshaminy Creek Water Shed," prepared by the U.S. Department of Agricultural, Soil Conservation Service in 1976. (NWRA Exhibit 13, p. 20).

21. In February, 1980, pursuant to the Rules of Practice and Procedure §2-4.3, DRBC issued its Environmental Assessment of the Neshaminy Water Supply System and related components and, at the same time, the Executive Director issued a notice of his intent to issue a "Negative Declaration." DRBC invited public comment to these documents. Notice of the Executive Director's intent was forwarded to all relevant federal and state agencies; also notice of the Executive Director's action was given at the DRBC public meeting of March 10, 1980. (NWRA Exhibit 13, pp. 20-21).

22. In August, 1980, pursuant to DRBC's Rules of Practice and Procedure, §2-4.4, DRBC issued its Final Environmental Assessment for the Neshaminy Water Supply System including the issuance by the Executive Director of a "Negative Declaration." Public notice of his recommendation to issue a "Negative Declaration" was sent to all the relevant state and federal agencies; also, said action was announced at the DRBC public meeting of August 27, 1980. (NWRA Exhibit 13, pp. 20-21).

23. On November 18, 1980, pursuant to public notice and DRBC's Rules of Practice and Procedure, §2-1.5, a public hearing was held on DRBC's proposal to amend its Comprehensive

Plan and to grant Section 3.8 approval under the Interstate Compact to NWRA and PECD to construct the components of the Neshaminy Water Supply System. (NWRA Exhibit 13, p. 21).

24. On February 18, 1981, DRBC authorized an amendment to the Comprehensive Plan and granted the Section 3.8 applications of both PECD and NWRA, subject to certain expressed conditions and limitations. (NWRA Exhibits 2 and 3).

25. The actions taken by DRBC in February, 1981 were reviewed by the U.S. District Court, Eastern District of Pennsylvania, in the matter of Delaware Water Emergency Group, et al., v. Gerald M. Hansler, et al., 536 F. Supp. 26(E.D. Pa. 1981). The primary issue before the court was whether the DRBC had fully and fairly considered the environmental impact of the proposed project in conformity with the National Environmental Policy Act of 1969.

26. In rendering his decision rejecting the challenges that the DRBC Environmental Assessment failed to comply with the National Environmental Policy Act, Judge VanArtsdalen concluded:

X  
The record in this case makes four matters quite obvious. First, there have been at least three prior EISs on the basic plan and concept, all of which were available and considered by DRBC. With the Level B Study, there have been at least four EISs prepared. Second, the project has been under constant study and updating of factual information from the plans inception to the present time, and indeed is subject to ongoing studies. Third, the only substantial change from heretofore approved the plans based on prior Environmental Impact Statements and other studies, is a substantial

reduction in the quantity of water to be withdrawn from NWRA's Water Treatment Plant. Fourth, the Environmental Assessment prepared is detailed, up-to-date and adequately considers any changed circumstances.

27. On Appeal to the Third Circuit Court of Appeals, the Third Circuit affirmed, without opinion, Judge VanArtsdalen's decision. (Delaware Water Emergency Group, et al. v. Gerald M. Hansler, et al., 681 F.2d 805 (3d Cir. 1982).

28. Following a preliminary meeting among PECO, NWRA and the U.S. Army Corps of Engineers Staff (Corps), by letter dated September 8, 1980, PECO and NWRA provided to the Corps a joint submission describing the Point Pleasant Pumping Facilities and Associated Systems. Said submission provided detailed information of all facilities including the treatment plant and all transmission mains. (Plaintiffs' Exhibit 15 and 60).

29. By letter dated October 28, 1980, after review of all material submitted by PECO and NWRA, the Corps advised PECO and NWRA that it had determined that two (2) permit applications were to be submitted; one (1) for the Pine Run rechannelization and one (1) for the Point Pleasant intake structure. All other facilities were covered by the "nationwide" permit program.

30. As a result of the Corps directive, in December, 1980, NWRA applied to the U.S. Army Corps of Engineers for a permit (Application No. WAPOP-R-800534-3) to construct a water intake structure in the Delaware River and under the Pennsylvania Canal at Point Pleasant and for a permit

(Application No. NAPOP-R-80-813-3) to rechannel a portion of Pine Run adjacent to the site for the water treatment plant. (Corps of Engineers, Exhibit 5).

31. On April 6, 1981, the Corps issued a public notice that NWRA had applied for the above-referenced permit. (Corps of Engineers Exhibit 3, p. 1).

32. On August 10, 1981, the Corps issued a notice of public hearing concerning NWRA's application for permits and scheduled said hearing for September 15, 1981. (Corps of Engineers Exhibit 2, p. 8).

33. On September 15, 1981, a public hearing was held on the NWRA applications at the Bucks County Community College, Newtown Township, Pennsylvania. The public hearing was attended by approximately 1000 concerned persons. (Corps of Engineers Exhibit 2, p. 8).

34. A record of the public hearing was prepared and notice of its availability was published on January 11, 1982. (Corps of Engineers Exhibit 2, p. 8).

35. The Commonwealth of Pennsylvania, Department of Environmental Resources, in conjunction with its evaluation of NWRA applications for, inter alia, the water intake structure, prepared an "Environmental Assessment." (NWRA Exhibit 13).

36. Said Environmental Assessment was issued in August of 1982 contemporaneously with the issuance of permits to NWRA and PECO. (NWRA Exhibit 13).

37. Said Environmental Assessment was forwarded to the Corps and reviewed by the Corps. (Corps of Engineers Exhibit 2).

38. On October 14, 1982, the Corps of Engineers issued an Environmental Assessment in conformity with the National Environmental Policy Act of 1969. (Neshaminy Water Resources Authority, Point Pleasant Diversion Project, Point Pleasant, Bucks County, Pennsylvania, Environmental Assessment, Corps of Engineers Exhibit 3).

39. The Environmental Assessment prepared by the Corps concluded, inter alia, that the issuance of a §10/404 permit did not constitute "major federal action" and that the installation of the water intake, conduit and pumphouse will not "significantly effect the environment." (Corps of Engineers Exhibit 3, pp. 17-18.)

40. On October 25, 1982, the U.S. Corps of Engineers issued permit No. NAWOP-R-80-534-3 to MWRA permitting MWRA to construct a water intake structure in the Delaware River/ Delaware Canal at Point Pleasant, Bucks County, Pennsylvania. (Corps of Engineers Exhibit 2).



II. THERE HAVE BEEN NO SIGNIFICANT CHANGES IN THE POINT PLEASANT PROJECT OR SURROUNDING ENVIRONMENTAL CIRCUMSTANCES SINCE JUDGE VANARTSDALEN'S DECISION IN DELAWARE I.

A. There will be No Adverse Impact on Fish and Aquatic Biota From The Change in the Location of the Intake Structure.

41. A 1978 Report prepared by RMC Corporation and the NWRA Environmental Report prepared in 1979 evaluated the effect that a shoreline intake would have on the aquatic life in the Delaware River. (W.T. 206, NWRA Exhibit 14).

42. The Environmental Assessment prepared by DRBC in February of 1980 concluded that such a shoreline intake would not cause a significant impingement or entrainment of aquatic life and as a result there would be no significant adverse effects. (DRBC Exhibit 3, page 2-37, 2-38).

43. During the pendency of the DRBC evaluation of NWRA's pending 3.8 application, a report was submitted by NWRA to DRBC entitled "Biological Evaluation of the Proposed Water Intake in the Delaware River at Point Pleasant, Pennsylvania." Said report was prepared by P. L. Harmon of the Pottstown Ecological Laboratories. (Harmon, 1980 Report, NWRA Exhibit 35).

44. The Harmon 1980 Report evaluated the effects of a wedge-wire intake structure located 200 feet from the Pennsylvania shore on all forms and stages of aquatic life located in the area of Point Pleasant; the evaluation included

an analysis of the impacts on all stages of American Shad, from the larvae stage up to adult. For purposes of his evaluation, he assumed it was a nursery and spawning area for shad. (NWRA Exhibit 35 pp 8-12).

45. The Harmon 1980 report concluded that the wedge-wire intake will effect a marked reduction in potential entrainment and impingement losses of aquatic life when compared to a conventional travelling screen design (shoreline intake). The operation of the proposed intake will not result in biologically significant impacts of the resident or migratory fish populations (NWRA Exhibit 35 p. 1).

46. At the time of the approval of the Docket Decision D-65-76 CP (8) by DRBC in February 18, 1981, DRBC engineering division and environmental unit staff had already reviewed the intake design change. (NWRA Exhibit 34; NWRA Exhibit 3, p. 8).

46. The only environmental impact not considered by DRBC of the intake structure on aquatic life was the effect said intake structure would have on shortnosed sturgeon. The existence of shortnosed sturgeon eight miles downstream from Point Pleasant was not determined until after the completion of the DRBC Environmental Evaluation. (Delaware I p. 46).

48. Subsequent to the DRBC Environmental Evaluation, NWRA proposed to extend the intake structure further into the river where velocities are greater. It was proposed to extend the intake an additional 45 feet into the river. (NWRA Exhibit 3).

49. The flow velocities of the river 245 feet from shore are greater than those velocities 200 feet from shore (NWRA Exhibit 6; NWRA Exhibit 35 p. 15).

50. Based upon a review of velocity measurements and the river contours, the back eddy in the river extends out 150-160 feet from the west bank. (NWRA Exhibit 4, Exhibit 6 and Exhibit 35).

51. The Fish and Wildlife Service concluded, in a letter dated March 26, 1982, that the location of the intake 45 feet farther out into the Delaware River and use of Johnson wedge-wire screens with a maximum inflow velocity of .5 feet per second and 2mm spacing will reduce localized adverse effect on the fishery. If a flow greater than 2,000 cfs can be maintained in the river at Point Pleasant, Fish and Wildlife Service expects very little negative effect on flow patterns in the back eddy caused by the change in the location of the intake structure (NWRA Exhibit 4 and DHEC Exhibit 16).

52. Even under the worst possible case conditions, the effect on aquatic life of a maximum withdrawal of 95 mgd, at a river flow of 2,500 cfs, will be practically nil. (NWRA Exhibit 7).

53. The eddy area is located at least 62 feet shoreward of the intake structure, at least 62 feet away from the intake location. (NWRA Exhibit 10).

54. Upon the completion of review by the Corps' Hydrology-Hydraulics Branch of materials submitted by Del-Aware and by GKY and Associates, Inc., it concluded that the subject

report does not provide any substantive or significant arguments for requiring additional investigation. Further, it was concluded that said reports tended to reveal a bias. (NWRA Exhibits 8, 9 and 10).

55. There is substantial and reasonable evidence in the record to support the Corp's conclusion that the proposed intake alignment intercepts the actual river channel and thus the main river at about a right angle and approximately 800 feet downstream of the mouth of the Tobickon Creek. (Corps of Engineers Exhibit 2 p. 20).

56. The maximum intake velocity of the intake structure will be .5 feet per second only when the maximum 95 mgd is being withdrawn. The average intake velocity, at that time, is .35 feet per second, and as the amount of water withdrawn reduces, the intake velocity reduces in a linear relationship. (NWRA Exhibit 7 and Plaintiff Exhibit 66).

57. The average flow velocity toward the screens, at 1 foot away from the screens, at the maximum rate of withdrawal, will only be approximately .1 feet per second. (Plaintiffs' Exhibit 66 p. 3).

58. When DRBC is not able to achieve a flow of Trenton of 3,000 cfs through the management of water stored within the Basin complementing natural flows, only water for public water supply purposes will be able to be withdrawn at Point Pleasant until PECO is able to provide its own storage facilities. (DRBC Exhibit 1 and 9, NWRA Exhibits 1, 2 and 3).

59. When flows are below 3,000 cfs, it is highly unlikely that NWRA will be able to withdraw the maximum amount it is allowed to withdraw for public water supply, 49 mgd, due to numerous factors, including DRBC Regulations and Conditions included in Docket Decision No. D-65-76CP(8). (NWRA Exhibit 3, Conditions Y and Z, NWRA Exhibit 7, DRBC Exhibit 9, DRBC Exhibit 1).

60. NWRA will not be able to withdraw the maximum amount for public water supply purposes unless such withdrawals are subsequently approved by DER through subsidiary water allocation permits (NWRA Exhibit 13, p. 65).

61. There was substantial evidence in the Corps record for it to conclude that the withdrawal of water as permitted and regulated by the DRBC will have no significant adverse impact on the Delaware River System. Withdrawal of water, even during low flow conditions, will result in no significant adverse impact on aquatic organisms due to entrainment and impingement; such intake represents the "State of the Art" technology with respect to intake structure design. (Corps of Engineers Exhibit 2 p. 15).

62. If, under unforeseen circumstances, an adverse impact upon aquatic life is noted, both DRBC and DER will require such corrective action as appropriate to mitigate such impact. (NWRA Exhibit 13, p. 32, NWRA Exhibit 3, Condition M).

63. No significant dangers are anticipated as a result of the backwashing of the intake structure (NWRA Exhibit 11).

64. The minimum surface elevation at a flow of 3,000 cfs is in excess of 70 feet and thus there will be at least a minimum of 4 feet of water between the top of the intake and the surface of the river at 3,000 cfs (NWRA Exhibit 5, Plaintiffs' Exhibit 66).

65. There is substantial evidence in the record to support DRBC conclusion that the design changes to the intake structure should reduce the degree of adverse biological impact from that already approved as of February, 1981. (p. 11, Staff Response, DRBC Exhibit 1).

B. No Significant Impact Will Be Caused On The Dissolved Oxygen Levels Or On The Salinity Levels In The Delaware River As A Result Of The Withdrawals At Point Pleasant.

66. There have not been any substantial changes in circumstances from February 18, 1981, that would cause any difference in the impacts caused by the withdrawal of water from Point Pleasant upon the dissolved oxygen and salinity levels in the Delaware River. (DRBC Exhibit 1: DRBC Resolution #82-22 and Staff Response to Petitioners' Factual Allegations of 9/24/82).

67. DRBC concluded in February, 1981, based upon its analysis of the affects of withdrawals, including materials contained in the Level B Study, that the effects of withdrawal at Point Pleasant when flows at Trenton are 3,000 cfs or lower, on salinity levels would be virtually immeasurable. (DRBC

Exhibit 3, p. IV-16, DRBC Exhibit 1, p. 3 of Staff Response, NWRA Exhibit 13, p. 84).

68. Because there is no change in the rate of withdrawal projected by NWRA or the use of the water as projected by NWRA from that which was proposed in 1981 and, further, in light of the fact that there is no change in the circumstances concerning the flow of Delaware River water, the impacts on salinity, as evaluated in 1981, are unchanged. (DRBC Exhibit 1).

69. The withdrawal of water at Point Pleasant will have an insignificant impact upon dissolved oxygen levels in the Delaware River even at flows as low as 2,000 cfs. (DRBC Exhibit 2, pp. 26-28, NWRA Exhibit 13, pp. 84, 88 and DRBC Exhibit 3).

70. The withdrawal of water at Point Pleasant will not affect the shad runs because the dissolved oxygen levels are substantially reduced at approximately river mile 93 based upon pollution discharges to the Delaware River which have a significant impact on the dissolved oxygen levels. (DRBC Exhibit 2).

71. The dissolved oxygen model used by DRBC did consider the effects of accumulated sediment deposits. (DRBC Exhibit 2, p.26).

72. It is not possible to significantly ameliorate the impacts of pollution loads upon dissolved oxygen concentration throughout the estuary by releasing stored water,

because of the vast amounts required to have a significant impact. (DRBC Exhibit 2, p. 76).

73. Only 3% of the time, since 1971, has the flows in the Delaware River been below 3,000 cfs. (Staff Response, p. 3, DRBC Exhibit 1).

74. There has been no change in the amounts of water to be withdrawn at Point Pleasant, the use of the water to be withdrawn, or the flows in the Delaware River from those considered in 1981. (DRBC Exhibit 1).

75. There is substantial evidence in the record to support the Corp's conclusion that the withdrawal of water as permitted and regulated by the Delaware River Basin Commission will have no significant adverse impact on the Delaware River System. The project, with conditions imposed by the DRBC, will have no significant affect on salinity intrusion of well fields and surface water users of the Delaware River. Withdrawal of water, even during low flow conditions, will have a biologically insignificant effect on downstream dissolved oxygen concentrations. (Findings of Fact p. 15, Corps Exhibit 2).

76. Flows in the East Branch Perkiomen Creek and North Branch Neshaminy Creek will be augmented by the project releases and minimum flows will be maintained under the project operating plan. The natural flow of the streams will not be diminished but will be augmented and enhanced, especially during low flow periods. (NWRA Exhibit 14, pp V-26-V-23; DRBC Exhibit 3, pp. 2-39-2-43; 2-51-2-53; IV-39; and appendix E;



NWRA Exhibit 13, pp. 46-59, 89; DRBC Exhibit 1, Staff Response, p. 14).

C. Groundwater Is Not A Viable Or Feasible Alternative To Surface Water Supply.

77. In studies undertaken prior to February, 1979, it was found that groundwater was inadequate to meet all of the future public water supply needs of Central Bucks and Montgomery Counties. The "no-action alternative" would deprive the residents of these counties of a safe, adequate water supply system and adverse economic and environmental conditions could be anticipated. The most prominent adverse conditions would be the lack of water for domestic, commercial and industrial needs, the drying up of surface water streams of the areas, and the contamination of the groundwater aquifer by over pumping of wells in an attempt to meet the water demands.

(Environmental Report on the Neshaminy Water Supply System, Neshaminy Water Resources Authority, February 1979, p. VII-7, NWRA Exhibit 14).

78. In August 1980, the Delaware River Basin Commission concluded that further development of groundwater was considered the "least desirable water supply alternative" for Central Bucks and Montgomery Counties. (Final Environmental Assessment for the Neshaminy Water Supply System, Delaware River Basin Commission, August 1980, pp. 2-28, DRBC Exhibit 3).

79. In 1980 and early 1981, the Eastern Pennsylvania Region endured a period of moderate to serious rainfall

shortages. By March 1981, over 4,000 domestic wells in this region had gone dry as a result of this drought. Four thousand families found themselves without water for essential drinking, sanitation and other domestic uses; costs of replacing these supplies represented an economic loss of over \$6.7 million.

(DER Environmental Assessment Report and Findings, Point Pleasant Water Supply Project, August 1982, p. 69, NWRA Exhibit 13).

80. In a special groundwater study of the Middle Delaware River Basin prepared by R. E. Wright Associates, Inc. for the Delaware River Basin Commission, Wright Associates concluded that groundwater withdrawals exceed dry year recharge in large areas of Bucks and Montgomery Counties. (Special Groundwater Study of the Middle Delaware River Basin, R. E. Wright Associates, Inc., July 1982, Vol. III, Chapter XIII, Plaintiffs' Exhibit 14).

81. Based on the information contained in the R.E. Wright Associates Groundwater Study prepared for the Delaware River Basin Commission, the Department of Environmental Resources determined in August, 1982, that further development of groundwater, as an alternative to a supplemental surface water supply, was an unacceptable option for the Central Bucks and Montgomery County Region. (Environmental Assessment, Report and Findings, Point Pleasant Water Supply Project, Department of Environmental Resources, August 1982, p. 71, NWRA Exhibit 13).

82. In September 1982, the Delaware River Basin re-evaluated the groundwater alternative to the Neshaminy Water Resources Authority Water Supply Project. The DRBC concluded, inter alia, that further development of the groundwater is an unacceptable option for the Central Bucks and Montgomery Counties. (Staff Response to Petitioners' Factual Allegations of September 24, 1982, Allegation 4-H, pp. 17-19, DRBC Exhibit 1).

III. THE U.S. ARMY CORPS OF ENGINEERS FULLY COMPLIED WITH THE MANDATES OF SECTIONS 106 AND 110(F) OF THE NATIONAL HISTORIC PRESERVATION ACT.

83. A 1978 report, commissioned by NWRA and written by two University of Pennsylvania Archeologists, Urban and Schortman, concluded that the Point Pleasant Pumping Station would not adversely effect potential archeological resources or historical resources, including the Delaware Division of the Pennsylvania Canal ("Canal") and the Village of Point Pleasant, if mitigation procedures as outlined in the report are followed. (Plaintiffs' Exhibit 44, pp. 35-37).

84. NWRA, based upon the Urban and Schortman Report, set forth in its 1979 Environmental Report procedures to be followed for placing of the intake conduit under the Canal, including the on-site presence of an archeologist. NWRA also proposed to design the Pump Station Building in a manner to conform with its surroundings. (NWRA Exhibit 14, Appendix C).

85. DRBC evaluated the Urban and Schortman Report and NWRA's Environmental Report and concluded that the Point Pleasant Pumping Station would result in no adverse impact upon nearby cultural resources, including the Canal. (DRBC Exhibit 3, pp. 30-34).

86. The designated State Historic Preservation Officer ("SHPO") in Pennsylvania is the Pennsylvania Historical and Museum Commission.

87. After reviewing DRBC's Final Environmental Assessment, the SHPO advised DRBC that the SHPO agreed that the Point Pleasant Pumping Station would have no adverse impact upon archeological resources in the area. The SHPO further said that the Point Pleasant Pumping Station would have a technical adverse impact upon the Canal which could be adequately mitigated by archeological monitoring of the project excavation as proposed. (NWRA Exhibit 16).

88. DRBC's approval under Section 3.8 of its Compact was conditioned upon adoption of the measures in Appendix C of NWRA's Environmental Report. (NWRA Exhibit 3).

89. DRBC was advised that consultation with the Advisory Council on Historic Preservation ("ACHP") under the National Historic Preservation Act of 1966 would be required in conjunction with review of the Point Pleasant Pumping Station. (NWRA Exhibit 16, Plaintiffs' Exhibit 45).

90. DRBC deferred to the Army Corps of Engineers in conjunction with the latter agency's review of NWRA's permit application for the construction of the intake structure, to

act as lead agency for the purpose of consultation with ACHP. (Plaintiffs' Exhibit 45).

91. Upon the recommendation of the SHPO, the Corps commissioned Ms. Elizabeth Mintz to prepare a report on the proposed Point Pleasant Historic District to be submitted to the Keeper of the National Register in support of a request by the Corps for a determination of eligibility of the Point Pleasant Historic District for inclusion in the National Register. (NWRA Exhibit 29-1).

92. On December 15, 1981 the Corps submitted to the keeper of the National Register said report along with its request for determination of eligibility and comments on the report prepared by the Bucks County Conservancy, NWRA and the Pennsylvania Historical and Museum Commission ("PHMC"). (Plaintiffs' Exhibit 48).

93. On December 29, 1981, the Point Pleasant Historic District was determined eligible for the National Register of Historic Places by the Keeper of the Register. Upon receipt of the Determination of Eligibility, the Corps began its consultation with ACHP in fulfillment of the responsibilities imposed by the National Historic Preservation Act of 1966 and its implementing regulations. (Plaintiffs' Exhibit 49).

94. In the meantime, there was an on-going consultation among the SHPO, NWRA, the Corps and the Heritage Conservation and Recreation Service ("HCRS") to develop plans for the aboveground elements of the Point Pleasant Pumping

Station which would either avoid or mitigate any potential adverse effects upon the Village of Point Pleasant.

95. On May 27, 1981, representatives of NWRA, the Corps, SHPO, and the HCRS attended a meeting at the site of the proposed Point Pleasant Pumping Station at which NWRA's plans for the design of the Pump Station Building and its attendant landscaping were reviewed and approved. (NWRA Exhibit 18).

96. On September 28, 1981, the SHPO formally approved NWRA's plans for the design of the Pump Station Building and its attendant landscaping and advised the Corps that, in the opinion of the SHPO, the proposed structure would not have an adverse impact upon the Village of Point Pleasant should it be determined eligible as an historic district. (NWRA Exhibit 19, Appendix F).

97. NWRA's plans for the design of the Pump Station Building and its attendant landscaping were also submitted to the ACHP. (Letter dated January 19, 1982 from E. H. Bouquard to Charlene [sic] Dwin, attached to letter dated March 18, 1982 from Ann A. Nevel to Richard Hassel, Army Corps of Engineers. (Certified Record, Part B).

98. The Corps commissioned Ms. Elizabeth Nintz to prepare a Preliminary Case Report which, when completed, was circulated, inter alia, to the SHPO, the ACHP and the Bucks County Conservancy. (NWRA Exhibit 19).

99. The Preliminary Case Report included the opinions of the Bucks County Conservancy and of Del-AMARE, Unlimited, Inc. as representative of the views of others who had expressed

concern about the potential affect of the proposed water intake facilities on historical and archeological resources in the vicinity and stated that those opinions had been noted by the Corps. (NWRA Exhibit 19, p. 15).

100. The Preliminary Case Report was submitted to the ACHP with a determination by the Corps that the Point Pleasant Pumping Station would have no adverse impact upon the Point Pleasant Historic District but would have a technical adverse effect upon the Canal which would be adequately mitigated if N.W.R.A.'s proposed construction procedures were implemented. (NWRA Exhibit 20).

101. The SHPO praised the Preliminary Case Report, however, reversed its earlier approvals and called for Pre-Construction Archeological Testing and Evaluation at the site. (NWRA Exhibit 21).

102. The ACHP, in conjunction with the Corps and the SHPO, with input from the Bucks County Conservancy and the BCBS, developed a Memorandum of Agreement designed to mitigate or avoid any potential adverse affects that may be caused by the Point Pleasant Pumping Station. The development process included a meeting attended by representatives of Del-AWARE Unlimited, Inc., the Bucks County Conservancy, the Corps, the ACHP, the SHPO and the BCBS.

103. The Memorandum of Agreement was signed by representatives of the Corps, the SHPO, and the ACHP. The Memorandum of Agreement is an attachment to and a condition of, NWRA's Permit from the Corps. (Corps of Engineers Exhibit 3).



104. In its Preliminary Case Report, the Corps noted that "every effort has been made to minimize harm to the Canal which may result from the present proposal for the location, design and construction of the water intake facilities. In light of the alternatives discussed and mitigation procedures outlined, the present proposal represents the most feasible and prudent course of action." (NWRA Exhibit 19, p. 14).

105. There has been and will be no Federal Funding for the Point Pleasant Pumping Station. (NWRA Exhibit 19, p. 17).  
to determine

106. The Canal is neither federally owned nor federally controlled. (NWRA Exhibit 22).

107. Alternatives to the Weshaminy Water Supply System as a whole as well as to the Point Pleasant Pumping Station were evaluated and rejected as infeasible by NWRA in the 1979 Environmental Report and by DHEC in its Final Environmental Assessment of 1980. (NWRA Exhibit 19, Appendix D).

108. On June 14, 1982, in response to a report written by Del-ANARE Unlimited, Inc. outlining proposed alternatives to the Point Pleasant Water Diversion Project, NWRA advised the Corps that NWRA and the expert regulatory agencies in their respective reviews and evaluation of the Weshaminy Water Supply System, have long been aware of, have fully studied and evaluated, and have rejected as infeasible, all the alternatives specifically suggested by Del-ANARE Unlimited, Inc. (NWRA Exhibit 23).



109. On August 13, 1982, the Secretary of the Pennsylvania Department of Environmental Resources ("DER") advised the ACHP that DER, in the process of preparing its Environmental Assessment in conjunction with the issuance of a Dams and Encroachment Permit to NWRA for the Point Pleasant Pumping Station, considered every alternative raised by Del-AWARE Unlimited, Inc. and other opponents of the project and that "none of the alternatives, or combinations of alternatives, was found to be more cost-effective or involved substantially less environmental impacts" than the proposed project. (NWRA Exhibit 13, pp 67-80; NWRA Exhibit 22).

110. The Corps was provided with the results of the Department of Environmental Resources 1982 evaluation of alternatives. (NWRA Exhibit 22; NWRA Exhibit 13).

111. The Corps' Preliminary Case Report concludes that the specific site selected for the Point Pleasant Pumping Station is virtually the only feasible one. (NWRA Exhibit 19, p. 12).

112. On September 9, 1982, the Corps advised the ACHP of the Corps confidence that there is no alternative but to cross the Canal for which planning steps had been taken to minimize any potential harm. (NWRA Exhibit 24).

113. The Department of Environmental Resources, the owner of the Canal, after its review and analysis of the construction procedures to be utilized in conjunction with the Canal crossing, granted approval of said procedures and concluded "that construction of the Point Pleasant project,

followed by restoration in accordance with the specifications approved by this agency, will leave the Delaware Canal in the vicinity of Point Pleasant in better shape than it is today." (NWRA Exhibit 13, pp. 43-46; NWRA Exhibit 22).

114. The Memorandum of Agreement requires NWRA to undertake an extensive archeological testing program prior to commencement of construction. (Corps of Engineers, Exhibit 5).

115. The Memorandum of Agreement requires NWRA to utilize specific construction and restoration procedures incident to the pipeline crossing under the Delaware Canal. (Corps of Engineers, Exhibit 5).

116. The Memorandum of Agreement requires NWRA to design the above ground facilities in consultation with the SEPO, landscape the area in a manner to minimize the visual impacts of the pumping station and boundary fence in the surrounding area. (Corps of Engineers Exhibit 5).

**IV. THE U.S. ARMY CORPS OF ENGINEERS CONSULTED WITH THE FISH AND WILDLIFE SERVICE IN ACCORDANCE WITH THE SUBSTANTIVE PROVISIONS OF THE FISH AND WILDLIFE COORDINATION ACT.**

117. In December, 1980, the U.S. Fish and Wildlife Service submitted substantive comments to the Delaware River Basin Commission for review in conjunction with the Delaware River Basin Commission's processing of NWRA's application for Section 3.8 approval. (Letter dated December 16, 1980 from Norman R. Chupp, Area Manager, U.S. Department of Interior,

Fish and Wildlife Service to the Delaware River Basin Commission, Corps of Engineers Exhibit 1).

118. From December 1980, to February 1981, the technical staff of the Delaware River Basin Commission reviewed and assessed the substantive concerns expressed by the Fish and Wildlife Service in their correspondence of December, 1980. (Staff Response to Chupp, December 16, 1980, statement in regard to the Weshaminy Water Resources Authority Project, Corps of Engineers Exhibit 1).

119. In February 1981, the Executive Director of the Delaware River Basin Commission notified the Honorable Sherman Tribbet, the Federal Representative on the DRBC, of the Delaware River Basin Commission's staff evaluation of the concerns expressed by the Fish and Wildlife Service. Contained therein was a detailed response to each and every issue raised by the Fish and Wildlife Service. (Letter dated February 4, 1981, from Gerald M. Hansler, Executive Director of the Delaware River Basin Commission to the Honorable Sherman W. Tribbet, Department of the Interior, with attachments, Corp of Engineers Exhibit 1).

120. The February 18, 1981 Docket Decision of the Delaware River Basin Commission clearly evidences DRBC's sensitivity to the issues that had been raised by the Fish and Wildlife Service. (NWRA Exhibit 3).

121. Condition "L" of the DRBC Docket Decision requires NWRA to cooperate with the Fish and Wildlife Service

in the choice of an intake structure design. (NWRA Docket Decision No. D-65-76CP(8), February 18, 1981, NWRA Exhibit 3).

122. Condition "N" of the DEBC Docket Decision requires NWRA to construct the intake structure in the river during the period between November through March "to reduce the potential for impact on migrating juveniles and adult shad." (NWRA Docket Decision D-65-76CP(8) February 18, 1981, NWRA Exhibit 3).

123. Condition "U" of the DEBC Docket Decision requires construction of the Delaware River intake and intake conduit to be controlled to minimize any and all impacts on existing wetland areas. (NWRA Docket Decision D-65-76CP(8), February 18, 1981, NWRA Exhibit 3).

124. The Delaware River Basin Commission consultation, review and conclusions with respect to the substantive concerns raised by the Fish and Wildlife Service were judicially approved by the United States District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals. (Del-Aware Water Emergency Group, et al. v. Gerald M. Hansler, et al., 536 F. Supp. 26 (E.D. Pa. 1981) *aff'd.*, 681 F.2d 805 (3d Cir. 1982)).

125. In June 1981, the U.S. Fish and Wildlife Service submitted to the U.S. Army Corps of Engineers substantive comments for consideration in the Corp processing of NWRA's permit application to build a water intake structure in the Delaware River at Point Pleasant. (Letter dated June 19, 1981, from the U.S. Department of the Interior, Fish and Wildlife

Service, to Colonel Ton, U.S. Army Corp of Engineers, Plaintiffs' Exhibit 65).

126. In July 1981, the Army Corp of Engineers requested the applicant, NWRA, to respond to the substantive comments raised by the U.S. Department of Interior, Fish and Wildlife Service. (Letter dated July 2, 1981, from Roy Denmark, Jr., Chief of the Corps, Permits Branch, to E.N. Bourquard, Engineer for Neshaminy Water Resources Authority, Corps of Engineers Exhibit 1).

127. By letter dated January 22, 1982, the applicant, NWRA, provided detailed substantive responses to the concerns expressed by the Fish and Wildlife Service in June 1981. The issues raised related to secondary impacts which have been fully evaluated by the DRBC when DRBC authorized NWRA to withdraw up to a maximum of 95 mgd from the Delaware River from Point Pleasant. Furthermore, the Fish and Wildlife Service's concerns regarding dissolved oxygen, diadromous fish, salinity intrusion in the Delaware Bay, effects of more "skimming reservoirs", and the effects of the diversion on the North Branch of the Neshaminy Creek and East Branch of the Perkiomen Creek were merely reiterations of the same concerns that had been raised by the Fish and Wildlife Service with the DRBC, all of which had been considered and addressed by the DRBC in Docket Decision No. D-65-76CP(8). (Letter dated January 22, 1982, to Lt. Col. Roger L. Baldwin, Army Corp of Engineers from Hershel J. Richman, attorney for Neshaminy Water Resources Authority, Corps of Engineers Exhibit 1).

128. In February 1982, the substantive comments and responses from Hershel J. Richman, attorney for Neshaminy Water Resources Authority, and E. H. Bouquard Associates, engineer for Neshaminy Water Resources Authority, were forwarded to the Fish and Wildlife Service by the Corps of Engineers for further evaluation and consultation. (Letter dated February 18, 1982 to Norman R. Chupp, U.S. Department of the Interior, Fish and Wildlife Service, from Roy E. Denmark, Jr., Chief, Permits Branch of the Corps of Engineers, Corps of Engineers Exhibit 1).

129. In March 1982, the Pennsylvania Fish Commission notified the United States Army Corps of Engineers indicating their opposition to the Point Pleasant Water Diversion Project. The Pennsylvania Fish Commission did not, however, state their reasons for such opposition nor did they indicate to the Corp what areas, if any, should be further evaluated in the permit application process. (Letter dated March 24, 1982, from Jack G. Miller, Chief, Fisheries Environmental Services, Pennsylvania Fish Commission, to Col. Roger L. Baldwin, District Engineer, Corp of Engineers, Corps of Engineers Exhibit 1).

130. In June, 1982, the Corp of Engineers responded to all of the substantive comments previously raised by Fish and Wildlife Service during the consultation process; specifically, "cumulative effects", "dissolved oxygen", and "salinity intrusion." (Letter dated June 1, 1982, from Col. Roger L. Baldwin, Corp of Engineers, to Norman R. Chupp, Area

Manager, U.S. Department of Interior, Fish and Wildlife Service, Corps of Engineers Exhibit 1).

131. In July, 1982, a new Memorandum of Agreement was entered into between the Department of Interior and the Department of the Army. Said Agreement adopted general policies and consultation procedures to be implemented by the two agencies in the Corp's processing of permit applications under §10 of the Rivers and Harbors Act, and §404 of the Clean Water Act. Additionally, the Memorandum of Agreement contained extensive procedures for review by a higher authority ("Elevation") in the event the Corps desired to issue a permit over outstanding objections by the Fish and Wildlife Service. (Memorandum of Agreement between the Department of Interior and the Department of the Army dated July 6, 1982, Corps Exhibit 4).

132. From July, 1982 to October, 1982, the Department of Interior, Fish and Wildlife Service and the U.S. Army Corps of Engineers continued consultation as required by the Fish and Wildlife Coordination Act; evidenced by approximately 15 pieces of correspondences between the two agencies. (Corps of Engineers Exhibit 1).

133. In September, 1982, in conformity with the Memorandum of Agreement entered into between the Department of the Army and the Department of the Interior, the Corps notified the Fish and Wildlife Service of their intent to issue a permit to WHRA. (Letter dated September 24, 1982 from Col. Roger L. Baldwin, Corp of Engineers, to Howard W. Larson, Regional



Director, U.S. Fish and Wildlife Service, Corps of Engineers Exhibit 1).

134. In October, 1982, the Fish and Wildlife Service responded to the Corps notice of intent to issue a permit to NWRA. Although expressing general opposition to the Point Pleasant project, the Fish and Wildlife Service notified the Corps that "Elevation" would not be sought. (Letter dated October 18, 1982, from Howard W. Larson, Regional Director of Fish and Wildlife Service to Col. Roger L. Baldwin, U.S. Army Corp of Engineers, Corps of Engineers Exhibit 1).

V. THE BIOLOGICAL OPINION OF THE NATIONAL MARINE FISHERIES SERVICE, DETERMINING NO SIGNIFICANT ADVERSE IMPACT ON THE ENDANGERED SHORTNOSED STURGEON, EVIDENCES FULL COMPLIANCE WITH THE ENDANGERED SPECIES ACT BY THE U.S. ARMY CORPS OF ENGINEERS.

135. Pursuant to the request of NMFS and the Corps, a biological assessment of the impacts of the Point Pleasant Pumping Station and associated intake structure on the endangered species of shortnosed sturgeon, Acipenser brevirostrum, was undertaken in 1981 by Harold M. Brundage of Ichthyological Associates, Inc. (NWRA Exhibit 36, p. 1).

136. Based on incidental capture records covering periods 1817 through 1981, the January 1982 biological assessment report states: "There is essentially no empirical information regarding utilization of the Delaware River near



Point Pleasant by shortnosed sturgeon." (NWRA Exhibit 36, pp. 70 and 51-67).

136. During Ichthyological Associates, Inc.'s intensive gill net sampling program, conducted from October through December 1981, no shortnose sturgeon were collected at the three sampling zones (1) upstream at Prahls Island, (2) Point Pleasant site or (3) downstream at Lumberville Wing Dam. (NWRA Exhibit 36, pp. 57-59).

138. All life cycles of the shortnose sturgeon including egg, larvae, juvenile, and adult stages, were portrayed in extensive detail in the January 1982 biological assessment and it concluded that "the Delaware River does not represent habitat unique or essential to shortnose sturgeon" and that "no critical habitat for the shortnose sturgeon has been designated." (NWRA Exhibit 36, pp. 72 and 35-50).

139. Construction of the intake structure will occur only from November through March; it is uncommon for shortnosed sturgeon to be in the upriver areas after August and is absent during mid-December through May. (NWRA Exhibit 36, p. 72).

140. No shortnose sturgeon should be present near the site during the construction period; however, assuming this species did occur at the site, a special submarine blasting procedure (designed to reduce concussion and minimize blasting vibrations) has been developed to minimize potential impact to aquatic life. Such procedure is based on considerable literature regarding physical properties of an underwater blast as related to the effect on fish. (NWRA Exhibit 36, p. 74).

141. Although there was no indication that the Point Pleasant area of the Delaware River is utilized by shortnose sturgeon, the January 1982 biological assessment assuming the "worst case" situation evaluated all potential impacts that the construction and operation of the Point Pleasant Pumping Station and intake structure could have on all life cycle stages of this species. (WWNA Exhibit 36, pp. 1 and 78-94).

142. The conclusions stated in the January 1982 biological assessment prepared by Ichthyological Associates, Inc. were: (1) no critical habitat for the shortnose sturgeon has been designated at Point Pleasant; (2) no shortnose sturgeon have been taken from such location either historically or during intensive net sampling program; (3) based on known seasonal movements and results of sampling, it is unlikely that shortnose sturgeon will occur in the vicinity of Point Pleasant during the construction periods November through March; (4) in the unlikely event that shortnose sturgeon did occur in the construction area, they would not be adversely affected by the construction because the increased turbidity is well within the species' tolerance range; (5) the Point Pleasant intake structure represents the state-of-the-art technology for mitigating entrainment/impingement of aquatic organisms and shortnose sturgeon during egg, larvae, juvenile, and adult life cycles; and (6) the project will have a biologically insignificant effect on downstream dissolved oxygen concentrations. (WWNA Exhibit 36, pp. 1-3).

143. Pursuant to Section 7(b) of the Endangered Species Act, NMFS reviewed the January 1982 biological assessment and all other available data concerning the potential impacts on the shortnose sturgeon and NMFS sent the Corps a Biological Opinion on July 19, 1982. (Corps of Engineers Exhibit 12).

144. NMFS' Biological Opinion dated July 19, 1982, concluded that "construction and operation of the Point Pleasant Pumping Station is not likely to jeopardize the continued existence of the endangered shortnose sturgeon in the Delaware River." (Corps of Engineers Exhibit 12, Biological Opinion, p. 16).

145. In its July 19, 1982 transmittal letter, NMFS advised the Corps that the Point Pleasant "project construction during the period November-March should cause no significant adverse effects on shortnose sturgeon present in the area....[and] the proposed state-of-the-art design of the water intake structure and projected schedule of withdrawals are adequate to ensure that juvenile and adult shortnose sturgeon as well as sturgeon eggs and larvae present in the project area will not be significantly affected." (Corps of Engineers Exhibit 12, p. 1).

146. NMFS advised Robert Sugarman (counsel to plaintiffs, Del-AWARE Unlimited, Inc.) by letter dated September 30, 1982, that the possibility of reduced by-pass velocities did not change the NMFS Biological Opinion which stated that "the operation of the Point Pleasant Pumping

Station would not be likely to jeopardize the continued existence of shortnose sturgeon in the Delaware River." (NWRA Exhibit 12, p. 1).

147. NWFS' "gave due consideration to the hydraulics of the proposed intake structure in the [biological] opinion, however, maintenance of river flow above 3,000 cfs throughout the year, was not a basis for our conclusion ....Sturgeon movement patterns from other river systems show that these life stages [larvae and juvenile] are not likely to stay in the upper reaches of the river for very long....Delaware River water flows peak in March and April, therefore, adequate water velocity should be maintained past the intake structures in the early Spring when shortnose sturgeon are likely to be in the vicinity." (NWRA Exhibit 12, p. 1).

VI. All of the Administrative Agencies Carried Out Their Review and Decision Making Responsibilities in Good Faith.

148. At the outset of their involvement in this matter, the Corps advised NWRA that it wanted to examine the entirety of NWRA's planned activities in connection with the Point Pleasant Water Diversion Project to ascertain what was involved, the extent of the Corps' jurisdiction and the permits which would eventually be required by NWRA and PECO to complete the project. To this end, the Corps required submission of extensive detailed data from NWRA. (Plaintiffs' Exhibit 15).

149. By letter dated September 8, 1980 NWRA and PECO provided the information requested. (Corps of Engineers Exhibit 9).

150. Thereafter, the Corps processed NWRA's application for permits for the Point Pleasant intake and pumping station and for the Pine Run rechannelization together, including holding public hearings on the two permit applications together. The processing of the application on the Point Pleasant intake and pumping station was completed before completion of the application on Pine Run and it was issued. (Corps of Engineers Exhibit 5).

151. Given the limitations on construction applicable to the intake, the length of time projected for completion of the intake and pumping station, the projected date by which PECO may need water from the Delaware, and the fact that the approval of the Pine Run rechannelization is not essential for the completion and use of the Point Pleasant diversion, it was reasonable for the Corps to issue the permit for Point Pleasant before completion of review of Pine Run.

152. The Corps' attempt to persuade the Fish and Wildlife Service not to "elevate" its objections to the project was not, nor is it evidence of, an abuse of discretion.

153. The Corps' determination, on or about June 8, 1981, that the Bucks County Conservancy was not a viable prospective contractor to perform historical and archeological reviews of the area including the Village of Point Pleasant, was proper in light of the letter of March 29, 1981 from the

Conservancy to the Corps apologizing for previously sending the Corps certain incomplete and incorrect information and explaining that they did not have the resources or staff to perform detailed reviews, even on a contract basis. (NWRA Exhibit 17).

134. NWRA's suggestion that the action be taken under National Historical Preservation Act prior to the determination of whether the Village of Point Pleasant was eligible for inclusion on the National Register of Historical Places was not improper, because they offered to be bound by the requirements of the Act upon the assumption that Point Pleasant was eligible. Moreover, the Corps refused to permit such action until the determination was formally made, which only caused further delay in the processing of the permit.

135. Colonel Baldwin's refusal to meet, or to send a representative to meet, with representatives of Del-AMARE on-site in December 1981 or to attend a conference sponsored by Del-AMARE and apparently focused on opposing the project, was not an abuse of discretion, nor was it unreasonable.

136. There is no evidence of record from which it could reasonably be inferred that the Corps, or any other reviewing agency, acted other than in the good faith desire to carry out their responsibilities under the law.

MEP-8-80-134-3

Neshaminy Water Resources Authority

STATEMENT OF FINDINGS

MEP-8-80-134-3

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

1. Name of Applicant: Neshaminy Water Resources Authority  
2875 Old York Road  
P. O. Box 378  
Jamison, Pennsylvania

2. Project Description, Location, Character and Purpose of the Proposed Activity:


General Overview of the Overall Point Pleasant Water Diversion

The proposed Point Pleasant Water Diversion is an integral component of the Neshaminy Water Supply System that is being implemented by the Neshaminy Water Resources Authority of Bucks County. This system would divert water from the Delaware River mainstem at Point Pleasant to (1) supplement public water supplies in Bucks and Montgomery Counties, and (2) provide water, when needed, to the Libby's Generating Station in Montgomery County.

The Point Pleasant Pumping Station would have an ultimate capacity to divert approximately 95 million gallons per day (mgd) of water and lift the water via a transmission main some 2.4 miles to the proposed Bradshaw Reservoir. The Bradshaw Reservoir would serve as a holding and control structure.

In the second segment, the water diverted from Bradshaw Reservoir to the Neshaminy Water Resources Authority water supply system would be released into a transmission main approximately one mile long to the North Branch of Neshaminy Creek, and then flow by gravity into and through Lake Galena to the North Branch water treatment plant located in Chalfont, Pennsylvania. After treatment to meet Federal and State drinking water standards, water would be distributed through several transmission mains to serve public water supply systems in Bucks and Montgomery Counties serving over 50 municipalities. These transmission facilities would be constructed and operated by NWRA. A maximum of approximately 49 mgd of water will be diverted for potable water augmentation.

Certified a true and correct copy of Records of the Corps of Engineers,  
Philadelphia District.

  
FRANK J. CIANFRANI  
Acting Chief, Permits Branch

A-114

Best Copy Available



NAPOP-R

SUBJECT: Application by Lehigh Valley Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

In the third segment, a maximum of 66 mgd would be pumped from the Bradshaw Reservoir via a transmission line some 6.7 miles to the East Branch Perkiomen Creek. Water released to the upper reaches of the East Branch Perkiomen Creek would flow by gravity in the stream channel to a diversion point near Graterford on the Perkiomen Creek, and thence via a transmission main to the Limerick Generating Station. This segment, including Bradshaw Reservoir, transfer facilities to Perkiomen Creek, and pumping facilities from Perkiomen Creek to Limerick, would be developed and operated by the Philadelphia Electric Company.

The extent of the Corps of Engineers regulatory jurisdiction/evaluation over pipeline projects is limited to those portions of the overall project involving stream crossings, intake structures and/or adjacent wetland crossings. Accordingly, Philadelphia District has reviewed the overall water diversion system and determined that the proposed intake structure/pipeline in the Delaware River and under the Delaware Canal (NAPOP-R-80-534-3), and the proposed relocation of Pine Run Creek at the North Branch treatment plant (NAPOP-R-80-813-3), requires processing of individual Department of the Army permit applications. All other stream crossings and other construction associated with the project are either not within the Corps regulatory jurisdiction, or are subject to existing Department of the Army nationwide permits and therefore do not require processing of individual Department of the Army permit applications (see Incl 1).

This Statement of Findings encompasses the proposed construction of the intake structure/pipeline in the Delaware River and under the Delaware Canal, hereafter referred to as proposed work NAPOP-R-80-534-3 (Incl 2). The proposed relocation of Pine Run Creek will be addressed in a separate Statement of Findings (NAPOP-R-80-813-3).

The Point Pleasant Water Diversion Project is within the jurisdiction of the Delaware River Basin Commission, a Federal/interstate agency having responsibility pursuant to the National Environmental Policy Act of 1969. Accordingly, the Delaware River Basin Commission (DREC) has performed an extensive evaluation of the proposed water diversion system. As the lead Federal permitting agency, the Delaware River Basin Commission has prepared a Final Environmental Impact Statement (1973) and an updated Environmental Assessment (August 1980). The Delaware River Basin Commission is an agency representing the views of the Commonwealth of Pennsylvania, the State of Delaware, the State of New Jersey, the State of New York, and the Federal

p. 115

Best Copy Available



NAPOP-R

SUBJECT: Application by Neshaminy Water Resources Authority, 2875 Old York Road, P. O. Box 378, Jamison, Pennsylvania for a Department of the Army permit to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania.

government. The Corps of Engineers in making its evaluation of the Department of the Army permit application has relied, in part, on the information, data and conclusions of the Delaware River Basin Commission.

b. Location: The project site is located on the west bank of the Delaware River approximately 0.3 mile downstream of the village of Point Pleasant in Plumstead Township, Bucks County, Pennsylvania.

c. Character: The project plans provide for constructing a water intake structure consisting of 40" diameter cylindrical wedge wire screens and support piping that would be located off the bottom of the Delaware River, approximately 245 feet channelward from the River bank at normal water level. The plans provide for placement of about 240 square yards of riprap at the base of the intake screens to prevent scouring. The plans also provide for constructing three conduits, each measuring 42 inches in diameter and about 300 feet in length that would be buried below the bed of the River and would connect to the proposed water intake structure. The plans also provide for excavating approximately 4000 cubic yards of materials by dragline method during the excavation operations. After the three conduits and support piping foundations are installed, the excavated area would be backfilled with suitable material to pre-existing bottom elevations. The plans also provide for installing about 390 linear feet of 72" diameter conduit at a minimum depth of 24 feet below the bed of the Pennsylvania Canal. Temporary earthen cofferdam would be utilized across the canal during the construction and trenching of the proposed 72" diameter conduit crossing under the canal. After the conduit is installed, the trench would be backfilled with suitable material to pre-existing canal bottom contours.

d. Purpose: The applicant's stated purpose for the proposed project is to supply treated potable water serving central portions of Bucks and Montgomery Counties, Pennsylvania, and to provide water, when needed, to the Limerick Generating Station in Montgomery County, Pennsylvania.

3. Corps of Engineers Regulatory Authority: Section 10 of the River and Harbor Act of 1899 and Section 404 of the Clean Water Act (33 USC 403 and 33 USC 1344).

NAPOP-R

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4. Summary of Prior Reviews and Evaluations of the Entire Point Pleasant Water Diversion System:

The information contained in this section was obtained, in part, from the Pennsylvania Department of Environmental Resources. The purpose of this section is to provide a brief history and indicate the extent of prior reviews and evaluation of the overall Point Pleasant Water Diversion System.

The Point Pleasant Water Diversion Project has been the subject of many reviews, evaluations, studies and assessments over a period of nearly twenty years. The following is a partial listing of prior reviews, evaluations and approvals by the Delaware River Basin Commission, State and County authorities and Federal Courts.

The basic Point Pleasant Water Supply System resulted from the 1966 Water Resources Study - Neshaminy Creek Basin, Pennsylvania (Pennsylvania Water Resources Bulletin No. 2), a report prepared jointly by the Pennsylvania Department of Forests and Waters (now Department of Environmental Resources), the Soil Conservation Service of the U. S. Department of Agriculture, and Bucks and Montgomery Counties.

The fundamental watershed system for Neshaminy Creek was approved by the Delaware River Basin Commission and added to the Delaware River Basin Comprehensive Plan on 26 October 1966, in Neshaminy Creek Watershed Project, Bucks and Montgomery Counties, Pa. DRBC Docket No. D-65-76 CP. This decision was supplemented by Bucks and Montgomery County Commissioners, Neshaminy Creek Watershed Project, Bucks and Montgomery Counties, Pa. DRBC Docket No. D-65-76 CP(2) (25 January 1967). The supplemental docket incorporated the entire multipurpose project as described in the 1966 Water Resources Study to the DRBC Comprehensive Plan.

In 1970, Bucks County prepared and submitted the Feasibility Study of Delaware River Pumping Facilities at Point Pleasant, Pennsylvania, which assessed the proposed design of the Point Pleasant diversion facilities to provide public water supply in Bucks and Montgomery Counties, together with water quality augmentation for the Neshaminy Creek.

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The Pennsylvania Water and Power Resources Board, on 8 December 1970, issued to Bucks County a Water Allocation Permit No. WA-649, authorizing the withdrawal of Delaware River water for public water supply.

5. On 17 March 1971, the Delaware River Basin Commission approved the plan in a document labeled Commissioners of Bucks County, Point Pleasant Pumping Station, Bucks County, Pa., DRBC Docket No. D-65-76 CP(3). This docket added the proposed project to DRBC's Comprehensive Plan, but deferred approval pursuant to Section 3.8 of the DRBC Compact until submission of final plans. The facilities included were a pumping station at Point Pleasant with the capacity and layout to handle all the required pumpage of the Delaware River water to the Neshaminy Basin, plus the proposed pumpage into the Perkiomen Creek Basin. As part of the 1971 docket review, Delaware River Basin Commission prepared and processed a draft Environmental Impact Statement for the system in accordance with the National Environmental Policy Act, entitled "Financial Statement - Environmental Impact of the Proposed Point Pleasant Diversion Plan, Bucks and Montgomery Counties, Pennsylvania". In February 1973, the Delaware River Basin Commission prepared and submitted to the Council on Environmental Quality an expanded Final Environmental Impact Statement on the Point Pleasant Water Diversion System.

In September of 1978, the Neshaminy Water Resources Authority filed an application with the Pennsylvania Department of Environmental Resources for a reduced water allocation permit for public water supply. After an extensive evaluation, summarized in the Report on the Application of the Neshaminy Water Resources Authority for Water Allocation from Pine Run, North Branch Neshaminy Creek, and Delaware River, (1 November 1978), ("DER Water Allocation Report"), the Pennsylvania Department of Environmental Resources approved Water Allocation Permit No. WA-0978601, which superseded and replaced the permit No. WA-649 previously issued on 8 December 1970, by the Pennsylvania Water and Power Resources Board.

In addition to providing treated water supply to Central Bucks and Montgomery Counties, the proposed Point Pleasant Water Diversion System will withdraw Delaware River water for transfer via Perkiomen Creek to be used by the Philadelphia Electric Company (PECO) for cooling purposes at its Limerick Generating Station located along the Schuylkill River near Pottstown, Pennsylvania.

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DRBC Docket No. D-65-76 CP(3) (17 March 1971) (referenced above), added the Perkomen transfer element for Limerick to the overall Point Pleasant Weshaminy project. As noted above, a Final Environmental Impact Statement on the Point Pleasant Diversion Plan, covering both the public water supply and Limerick transfers, was prepared by DRBC and filed with the Council on Environmental Quality in February 1973.

The Delaware River Basin Commission subsequently approved the water supply features of the system to the Limerick Generating Station subject to a specific list of conditions (Delaware River Basin Commission Docket No. D-69-210 CP, 29 March 1973) (Incl 3).

In November 1973, the U. S. Atomic Energy Commission's Directorate of Licensing completed the Final Environmental Statement related to the Proposed Limerick Generating Station, Units 1 and 2, Philadelphia Electric Company. Based on this EIS, the previous EIS prepared by Delaware River Basin Commission (DRBC), and the record compiled at hearings before the Atomic Safety and Licensing Board and the Appeal Board of the Nuclear Regulatory Commission (NRC), the NRC issued to Philadelphia Electric Company construction permits for the Limerick plant in March 1975. A decision was rendered by the Atomic Safety and Licensing Appeal Board. In the Matter of Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352 and 50-353 (19 March 1975). The decision specifically addressed numerous contentions made by intervenors in the AEC/NRC proceedings concerning the adequacy of the final EIS prepared in 1973 by the Atomic Energy Commission. Based on the AEC Final EIS and DRBC's own EIS of 1973, DRBC issued Docket approval No. D-69-210 CP (5 November 1975) for the construction of Limerick's water supply facilities (Incl 4).

Delaware River Basin Commission (DRBC) Docket No. D-69-210 CP included the Limerick project in the DRBC Comprehensive Plan. The docket further gave Section 3.8 approval for construction of the Limerick Station, together with the Schuylkill River and Perkomen Creek intake and diversion structures. Meanwhile, the Atomic Safety and Licensing Appeal Board's decision, and NRC's issuance of construction permits for Limerick, were appealed to the Third Circuit Federal Court of Appeals by the project's opponents. The appellants challenged the adequacy of the environmental impact statements relied on by the NRC, both the EIS prepared by the Atomic Energy Commission and that prepared by DRBC in February 1973. In particular, appellants charged that the previous environmental impact statements had not properly

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assessed the impacts of water supply elements of the Limerick project, including the Point Pleasant diversion.

The Third Circuit's decision on the appeal was rendered in Environmental Coalition of Nuclear Power, Limerick Ecology Action, and Delaware Valley Committee for Protection of the Environment v. Nuclear Regulatory Commission and Philadelphia Electric Company, No. 75-1421 (12 November 1975). The Court of Appeals rejected the challenges to the environmental impact statements and found the previous environmental assessments prepared by DRBC and the NRC adequate to satisfy the purposes of National Environmental Policy Act of 1968 (NEPA). The Third Circuit's decision and order were not appealed to the U. S. Supreme Court.

The combined project again came before Delaware River Basin Commission in proceedings commencing in 1979. On 27 January 1979, PECO filed with DRBC an application pursuant to Section 3.8 of the Compact for approval of the construction of its portions of the Point Pleasant pumping station, Bradshaw Reservoir, and transmission lines to the Perkiomen Creek.

On 5 July 1979, M&RA filed application pursuant to Section 3.8 of the Compact for approval of construction of its portions of the Point Pleasant pumping station, the water treatment plant at Chalfont and the various transmission lines. Both Section 3.8 applications were supported by detailed "environmental reports," prepared by the applicants as required by the then applicable DRBC Regulations 18 C.F.R. Section 401.51-401.53 (1977).

In August 1980, the DRBC prepared and published a "Final Environmental Assessment for the Neshaminy Water Supply System" project sponsored by M&RA and PECO. The Executive Director of the Delaware River Basin Commission, on the basis of the environmental assessment, recommended that a new EIS not be prepared based on his conclusion that the proposed projects would have no significant adverse impacts on the human environment. On 18 February 1981, DRBC approved the Section 3.8 applications of both PECO and M&RA (Incl 5). The construction details of the project were added to the Comprehensive Plan.

These actions by Delaware River Basin Commission were the subject of appeals filed before the U. S. District Court, Eastern District of Pennsylvania, in the matter of Delaware Water Emergency Group, et. al., v. Gerald M. Mansler, et. al., Civil Action No. 80-4372, 17 August 1981. The primary issue before

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the court was whether DRBC had fully and fairly considered the environmental impacts of the proposed project with particular emphasis on impacts upon basin water resources.

In rendering its decision, the District Court rejected the allegations and concluded:

"The record in this case makes four matters quite obvious. First, there have been at least three prior EIS's on the basic plan and concept, all of which were available and considered by DRBC. With the Level B study, there have been at least four EIS's prepared. Second, the project has been under constant study and updating of factual information from the plans inception to the present time, and indeed is subject to ongoing studies. Third, the only substantial change from heretofore approved plans based on prior environmental impact statements and other studies is a substantial reduction in the quantity of water to be withdrawn for NWRA's water treatment plant. Fourth, the environmental assessment prepared is detailed, up-to-date and adequately considers any changed circumstances."

This Court decision was affirmed by the Third U. S. Circuit Court of Appeals on 19 March 1982.

6. Date of Public Notice or Public Hearing and Summary of Comments:

a. Date of Public Notice: All known interested parties were notified of the proposal by Public Notices NAPCP-R-80-534-3 dated 4 April 1981 (Incl 6) and NAPCP-R-80-534-3-Supplement Number 1 dated 9 February 1982 (Incl 7).

b. Public Hearing: Notification for a Corps of Engineers public hearing was issued on 10 August 1981, NAPCP-R-80-534-3-HRG (Incl 8). A public hearing was conducted on Tuesday, 15 September 1981 at the Bucks County Community College, Newtown Township, Pennsylvania. A record of the public hearing was prepared (Incl 9) and notice of its availability was published on 11 January 1982 (Incl 10).



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c. Summary of Public Comments: More than 300 letters have been received in response to the proposed project (Incl 11). The primary concerns expressed are as follows:

- (1) Impact of water withdrawal on salinity intrusion.
- (2) Impact of water withdrawal on water quality.
- (3) Impact of water withdrawal on aquifer recharge.
- (4) Impact of water withdrawal on impingement and entrainment.
- (5) Impact of water withdrawal on fish and wildlife resources.
- (6) Consumptive use of water.
- (7) Impact of blasting on surrounding community.
- (8) Impact on aesthetics.
- (9) Impact on wetlands.
- (10) Impact on navigation.
- (11) Impact on historic resources.
- (12) Impact on air quality.
- (13) Impact on noise levels.

Many of these issues have been evaluated and addressed by the Delaware River Basin Commission prior to their issuance of docket approval for the project. Where appropriate, the Corps has relied on the expertise of the DRBC with respect to certain construction and operational aspects of the project. Issues such as these directly related to water supply and/or water allocation are beyond the scope of jurisdiction of the Corps of Engineers and are the responsibility of the DRBC.

d. Summary of Federal and State Congressional Interests:

(1) Federal:

(a) Honorable James E. Coyne (Congressman, 8th Philadelphia District) - expressed interest in the overall project. Urged Corps to make a thorough and complete review of the project prior to making a final decision (Incl 12).

(b) Honorable Robert W. Edgar (Congressman, 7th Philadelphia District) - requested that the Corps of Engineers conduct a public hearing and expressed concern with respect to the project's impact on water quality, fish and wildlife, salinity intrusion and consumptive use of water. The Congressman requested that the Corps of Engineers prepare an Environmental

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Impact Statement (Incl 13).

(c) Honorable Charles F. Dougherty (Congressmen, 4th Philadelphia District) - forwarded copies of constituents letters (Incl 14).

(d) Honorable James J. Florio (Congressmen, 1st New Jersey District) - requested that the Corps of Engineers conduct a public hearing (Incl 15).

(2) State:

(a) Honorable James C. Greenwood (State Representative, Philadelphia District) - requested that the Corps of Engineers conduct a public hearing (Incl 16).

e. Summary of Other Federal Agency Comments:

(1) U. S. Environmental Protection Agency - In letters dated 5 May 1981 and 5 August 1982 stated that they have considered the potential pollution as well as other possible effects on the environment that may result from the project construction and have no objection to permit issuance provided the following conditions are met (Incl 17). These conditions will be made part of any permit issued for the proposed work:

(a) That a water quality certificate is issued by the Pennsylvania Department of Environmental Resources for the project.

(b) Flow velocities at the water intake shall be controlled to avoid impacts to aquatic life due to impingement on the intake screens

(c) Construction practices shall be restricted to prohibit any double handling of excavated or dredged materials in the waterway.

(d) Dredging and/or filling will be done so as to minimize disturbance of the bottom or turbidity increases in the water.

(e) Deposition of dredged or excavated materials on shore, and all earthwork operations on shore will be carried out in such a way as to minimize erosion of the material and preclude its entry into the waterway.



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(f) On completion of earthwork operations, all fills on shore, and other areas on shore disturbed during construction, will be seeded, rip-rapped or given some other type of protection from subsequent soil erosion.

(g) Applicant will employ measures during construction to prevent spills of fuels or lubricants. If a spill occurs, it will be controlled to prevent its entry into the waterway.

(2) National Oceanic and Atmospheric Administration: In a letter dated 30 August 1982, the National Marine Fisheries Service expressed no objection to issuance of a Department of the Army permit. The project would have no significant adverse impact on national marine fisheries resources (Incl 18).

Pursuant to Section 7 of the Endangered Species Act of 1973, formal consultation with the National Marine Fisheries Service was undertaken to determine the potential impact of the proposed work on the shortnose sturgeon in the Delaware River, a Federally listed endangered species. Accordingly, a biological assessment of the probable, potential impacts of the project was prepared and coordinated with National Marine Fisheries Service (Incl 19).

The National Marine Fisheries Service concluded in its biological opinion of 19 July 1982 that the construction and operation of the proposed intake structure would not likely jeopardize the continued existence of the endangered shortnose sturgeon in the Delaware River (Incl 20). In addition, National Marine Fisheries Service recommended that additional research and monitoring be performed to obtain site specific data on shortnose sturgeon occurrence and utilization of the project site.

(3) U. S. Department of the Interior, Fish and Wildlife Service - In letters dated 19 June 1981 and 26 March 1982, the USDOI contended that sufficient information concerning the projects potential impact on fish and wildlife resources was not available. The Service recommended that the Corps of Engineers perform an independent assessment of the cumulative impacts of the project, particularly with respect to dissolved oxygen and salinity intrusion. In response to the recommendations of USDOI, the District Engineer provided additional information on 18 February 1982 and 1 June 1982. The USDOI in letters dated 12 July 1982, 23 July 1982 and

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3 August 1982 reiterated their previous comments and objected to the issuance of a Department of the Army permit (Incl 21).

(4) Advisory Council on Historic Preservation (ACHP):

The project site is in the area of the Delaware Canal, a National Landmark and a property listed in the National Register of Historic Places. In addition, the work site is within the Historic District of Point Pleasant, an area determined eligible for listing in the National Register of Historic Places by the USDOH, Keeper of the National Register (Incl 22). In accordance with National Historic Preservation Act, 16 USC 470 and regulations 36 CFR 800 extensive coordination/consultation with the ACHP and others was conducted. The formal consultation procedures have been concluded with the ACHP by the preparation and signing of a Memorandum of Agreement, outlining measures to protect historic resources and values of the area (Incl 23).

7. Views of State and Local Authorities:

a. State:

(1) The Pennsylvania Department of Environmental Resources has prepared a detailed Environmental Assessment on the project and has issued their requisite Dams Safety and Encroachment Permits on 2 September 1982 (Incl 24). In addition a Water Quality certificate was issued on 2 September 1982 (Incl 25).

Under current Federal regulations issuance of a water quality certificate is considered conclusive with respect to water quality considerations. Furthermore, where officially adopted state land use classifications, determinations, or policies are applicable to the land or water areas under consideration, issuance of state approval(s) is presumed to reflect the local public interest.

(2) Pennsylvania Fish Commission in letters dated 4 May 1981 and 24 March 1982 (Incl 26) expressed concern with regard to the project's impact on fisheries resources of the Delaware River.

The Pennsylvania Fish Commission is a State agency having responsibility for providing comments and recommendations to the Pennsylvania Department of

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Environmental Resources in their permit application review process. The permit decision(s) of the Pennsylvania Department of Environmental Resources reflects the final consolidated position of the Commonwealth concerning the project's potential impacts, including fishery resources.

(3) Pennsylvania State Historic Preservation Office (SHPO) - The project site is in the area of the Delaware Canal, a National Landmark and a property listed in the National Register of Historic Places. In addition, the work site lies with the Historic District of Point Pleasant, an area determined eligible for listing in the National Register of Historic Places by the USDOI, Keeper of the National Register (Incl 22). In accordance with applicable Federal regulations, extensive coordination/consultation with the SHPO and others was conducted. The formal consultation procedures have been concluded with the SHPO by the preparation and signing of a Memorandum of Agreement, outlining measures to protect historic resources and values of the area (Incl 23).

b. Local: Compliance with Plumstead Township, local building and zoning ordinances may be required (Incl 27).

B. Views of the District Engineer concerning probable effects of the proposed construction and operation of the intake structure on:

a. Navigation: No significant effect. The proposed pipeline crossing the Delaware Canal and extending into the Delaware River will be buried beneath the canal and river bottom with a minimum of four feet of cover. The only portion of the pipeline above the existing river bottom will be the intake screen assembly. This assembly will be located at a minimum depth of approximately 4 feet below the water surface at minimum river flow of 1400 - 1500 CFS. The Delaware River at the project location does not support commercial navigation. It does however, provide for some recreational boating, i.e.: small power boats, canoes, rafts and inner tubes. Even though the proposed 4 foot depth of water over the intake screens is considered to be adequate for navigation, any permit issued will also include a condition requiring marking of the intake screen assembly to further safeguard boating in the area.

The water intake screens are periodically backwashed by releasing compressed air through the cylindrical screens. The air will then rise to the water surface. There will be some disturbance of the water surface due

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to this air backwash and precautions will be taken in the operating procedures to assure that the area is clear of water craft and people.

The air storage tank and all controls for operation of the backwash will be at the gate well. As an added precaution, the operator will only be able to operate the backwash controls from the top of the gate well. This location of the controls puts the operator near the River bank and about 17 feet above normal water level where he can observe the River, both upstream and downstream for some distance.

b. Harbor Lines: Not applicable.

c. Flood Heights, Drift and Flood Damage Protection: No significant impact. The project will involve the placement of permanent fill within the existing floodplain, however, the area of fill is extremely small (0.5 acres) in relation to the overall floodplain. The project has been designed to minimize impact on the floodplain.

d. Erosion or Accretion: No significant effect. All construction work will be performed in accordance with applicable soil erosion standards as set forth by the Pennsylvania Department of Environmental Resources. All areas disturbed during construction will be adequately stabilized against erosion.

e. Conservation: No significant effect. The construction will cause some short term adverse effects such as increases in noise, airborne dust and vehicular traffic in the area. Rock excavation and blasting during construction will have no significant effect on the surrounding environment. Construction of the pipeline beneath the Delaware River will result in some temporary turbidity. However, no permanent impact is expected since all trenches and disturbed areas will be returned to preconstruction elevation and condition. The construction of the pipeline will eliminate by filling approximately 0.22 acres of wetland vegetation. These wetlands are typical of floodplain forested areas in the vicinity. The wetland area to be impacted is not considered significant in either size or character. The project has been designed and will be constructed so as to minimize to the maximum extent

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practicable impact on existing aquatic/wetland habitat (see Incl 30, Environmental Assessment).

f. Fish & Wildlife: The project will result in the permanent loss by filling of approximately 0.22 acres of wetlands. The impact on these wetlands is not considered significant. All areas temporarily disturbed during construction will be restored to pre-project condition. The intake screens and pipes will be constructed during the months of November through March in order to avoid adverse impacts on aquatic life. Impact on fisheries from blasting will be minimized through the use of "scare charges" and small, slow burning charges. Operation of the intake structure as permitted by the Delaware River Basin Commission will result in no significant adverse impact on aquatic organisms through entrainment and impingement. The intake structure will be fitted with Johnson wedge wire screens designed to reduce, to the maximum extent possible, impacts of entrainment and impingement of aquatic life. The use of these screens represents the "State of the Art" technology with respect to intake structure design.

Withdrawal of water as permitted and regulated by the Delaware River Basin Commission will have no significant adverse impact on the Delaware River system. The project with conditions imposed by the DRBC will have no significant effect on salinity intrusion of well fields and surface water users of the Delaware River. Withdrawal of water, even during low flow conditions, will have a biologically insignificant effect on downstream dissolved oxygen concentrations (see District Environmental Assessment (Incl 30)).

Pursuant to Section 7 of the Endangered Species Act of 1973, a biological assessment of the project's potential impact on the endangered shortnose sturgeon was prepared and coordinated with the National Marine Fisheries Service (Incl 19). The National Marine Fisheries Service's Biological Opinion determined that the proposed construction and operation of the intake structure will have no significant effect on the shortnose sturgeon nor will it likely jeopardize their continued existence (Environmental Assessment (Incl 30) and Biological Opinion (Incl 20)).

g. Water Quality: The proposed construction should have no significant impact on water quality of the Delaware River. The project will be constructed in accordance with sound engineering practices minimizing potential impacts on the environment. There will be some turbidity during construction, (trenching, blasting, etc.). However, any associated adverse

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Impacts will be temporary in nature and will have no significant long term effect on the water quality of the River system.

Withdrawal of water as permitted and regulated by the Delaware River Basin Commission will have no significant effect on the water quality of the Delaware River System. The project with conditions imposed by the DRBC will have no significant effect on salinity intrusion and on downstream dissolved oxygen concentrations (see Environmental Assessment (Incl 30)).

In addition, the Commonwealth of Pennsylvania, in accordance with Section 401 of the Clean Water Act, has issued a water quality certificate for the Point Pleasant water diversion.

h. Aesthetics: No significant impact. Where possible all areas disturbed during construction will be restored to pre-project conditions. Permanent structures will be designed and built of materials so as to conform with the natural rural setting of the area. In addition, appropriate landscaping will be included to further minimize any aesthetic impact of the proposed work.

i. Historic Values: No significant effect. The project site is located within the Point Pleasant Historic District. As stated previously, the Historic District has been determined eligible for inclusion in the National Register of Historic Places by the U. S. Department of the Interior, Keeper of the National Register. In addition, the proposed project involves the pipeline crossing of the Pennsylvania/Delaware Canal, a National Landmark currently listed on the National Register of Historic Places.

It has been determined, in coordination with State Historic Preservation Office and Advisory Council on Historic Preservation, that the project as proposed will have a technical adverse effect on the Point Pleasant Historic District and on the Pennsylvania/Delaware Canal.

In accordance with 33 CFR 800, a Memorandum of Agreement has been adopted to protect to the maximum extent possible the historic values of the area (Incl 23).



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j. Recreation: No significant effect. See item 8(a) and (i).

k. Economy: During construction, the project will provide increased employment in the building trades. Realization of the project will provide additional potable water supply to portions of Bucks and Montgomery Counties. In addition, supplemental water will be provided to the Limerick Generating Station to augment cooling requirements for production of electric power for public consumption.

l. Water Supply: The purpose of the proposed project is to withdraw water from the Delaware River to supply treated potable water to portions of Bucks and Montgomery Counties and to the Limerick Generating Station for make up cooling water in the production of electric power. The diversion of water as permitted and regulated by the DRBC will have no significant adverse effects on existing water supplies and other water users (see Environmental Assessment (Incl 30)).

m. Energy Needs: There will be little or no effect on energy needs by virtue of the project construction itself. However, upon project completion, a portion of the water to be withdrawn will be supplied to the Limerick Generating Station to be used in the generation of electrical power for public consumption. Operation of the pumping facility will require some electric power consumption.

n. Land Use Classification and Coastal Zone Management Plan: The proposed intake structure and pump-house will be located within a relatively undeveloped area within Plumstead Township, zoned R1-residential. Prior to construction/operation of the project, Neshaminy Water Resources Authority must obtain any county or local approvals required by law for the work and structures.

The project site is not within the approved Pennsylvania Coastal Zone.

o. Blasting Impacts - No significant impact anticipated.

In DRBC's Final Environmental Assessment (August 1980), the section on rock blasting impacts concludes that the specifications proposed by MMRA's consultant (Mr. Robert H. Davis) are well within the criteria set by DRBC's consultant (Converse Ward Davis Dixon, Inc.) as outlined in the "Report on Evaluation of Rock Excavation and Impact of Blasting for the Proposed Point

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Pleasant Pumping Facilities, Point Pleasant, Pennsylvania" (20 May 1980) (Incl 28).

Revisions were made to the plans that Converse Ward Davis Dixon originally reviewed (i.e.: further extension of the intake into Delaware River). In letters to E. H. Bourquard Associates, Inc. dated 28 August 1981 and 4 February 1982 (Incl 29), Converse again stated that their original conclusions and recommendations were still valid, provided that blasting criteria specified in their 20 May 1980 report are followed. Converse also indicated that the nearby structures mentioned in their 20 May 1980 report, which would be adequately protected by the proposed blasting criteria, includes the Delaware Canal locks.

Neshaminy Water Resources Authority will perform all blasting in a controlled manner to assure that there is no damage to nearby structures. MWRA will take all necessary measures to protect sites of archeological or historical significance (Incl 23, MOA).

In addition, the effects of blasting have been thoroughly reviewed by the Pennsylvania Department of Environmental Resources and that agency has concluded that no significant effects would result by reason of blasting operations. See item 8 (f) for probable impact on fish and wildlife resources.

9. Other Pertinent Remarks:

a. The Delaware River Basin Commission and the Pennsylvania Department of Environmental Resources has evaluated the need for additional water supply to the Limerick Generating Station, Bucks and Montgomery Counties and has approved the Point Pleasant Water Diversion project. The approvals of DRBC and Pa.DER are considered conclusive with respect to the need for additional water. The construction of the proposed intake structure would provide the means for the water withdrawal.

In a recent preliminary decision, the Pennsylvania Public Utility Commission indicated that Limerick Unit 1 should proceed to completion of construction, but requested that PECO provide additional justification as to the necessity of completing Unit 2 according to current schedules. Whether development of Unit 2 will be completed on schedule, delayed, deferred or terminated remains undecided.



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Since the possibility exists that a second unit would eventually be constructed over the life of the project, sizing of the intake structure, conduits and transmissions mains to accommodate the water requirements of both units is in accordance with sound engineering practices. Construction as proposed in such capacity would avoid the need for later expansion of such facilities, or the need to install duplicate facilities.

b. Appropriate Alternatives: The DRBC, as the lead Federal Agency having particular expertise and jurisdiction with respect to water usage and allocation within the Delaware River Basin, has in its docket review evaluated alternate sources and methods of water supply. On 18 February 1981, DRBC issued its docket approval for the Point Pleasant Water Diversion System. The decision was sustained by the U. S. District Court for the Eastern District of Pennsylvania, Civil No. 80-4327, 17 August 1981; affirmed, U. S. Circuit Court of Appeals for the Third Circuit, No. 81-2622, March 1982.

Accordingly, the Corps of Engineers' evaluation of the project alternatives is with respect to construction and operational impacts of the Delaware River intake only. It is considered unnecessary to conduct an in-depth evaluation of alternative supply sources notwithstanding the uncertainty regarding Limerick Unit No. 2. The Delaware River Basin Commission Docket, D-65-76CP(8) clearly establishes the need for the structure for Bucks County water supply. The need for the structure is independent of the Limerick water supply requirements. DRBC and Pa. DER have full authority to review this case at any time and to amend or withdraw their approvals if less water is needed. Issuance of a Corps permit for the intake will not usurp or impinge upon the authority of those local agencies.

The topographical configuration and present land uses of the area at and southwest of the Village of Point Pleasant are such that they do not offer a wide choice of sites for a major pumping installation. The northern portion of the Village, being more developed, would be an undesirable and costly location for an intake, pumping station and transmission pipeline. Also, locating the pump station in a more northerly location is precluded by the existence of archaeological sites. The southernmost portion is severely restricted by the lack of adequate level terrain due to the closeness of the bluff and State Route 32 to the river bank. Locating the pump station in a more southerly direction is further precluded by the existence of an archaeological site located southeast of the proposed intake conduit. In summary, once it was determined that the Point Pleasant area was the appropriate location for the withdrawal, the specific site selected

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for the pump station is virtually the only feasible one. Another major constraint is the location and effect of the Tohickon Creek. The combined Transmission Main should, if possible, be located south of the Tohickon Creek in order to avoid crossing a major stream in a deep rock valley. In addition, upon entering the Delaware River, the water from Tohickon Creek produces a significant change of flow velocity of the river with the accompanying turbulence and eddies. The effect of the eddies has been the build-up of a large sediment deposit in the river below the mouth of the Creek. The river intake should be located at some distance away from these alluvial deposits in order to avoid siltation at the intake entrance. The proposed intake alignment intercepts the actual river channel and thus the main river at about a right angle and approximately 300 feet downstream of the mouth of the Tohickon Creek. At this point, the river channel has returned to a more normal cross-section after having been restricted by the alluvial deposition below its confluence with the Tohickon Creek. The intake at this location had the additional advantages of minimal interference from loose surface ice, frazil ice and floating logs being drawn into the intake, and from silt and sand being deposited at the intake entrance.

An onshore traveling screen intake system aligned flush with the river bank was considered as an alternative to the presently proposed wedge-wire intake system. It was determined that a traveling screen system would adversely impact the aquatic environment by impingement and entrainment losses. The intake assembly as presently proposed minimizes any adverse environmental impacts.

c. Extent and Permanence of Beneficial and/or Detrimental Effects:

(1) Beneficial Effects - Realization of the project will provide increased availability of potable water to Bucks and Montgomery Counties. In addition, the project will provide additional water supply to the Limerick Generating Station to be used in the production of electric power for public consumption. See Item 8 (m) above.

(2) Detrimental Effects - No significant long-term impacts are anticipated (see item 8 (a) through (c)).

d. Probable Impact in Relation to Cumulative Effects Caused by Other Activities: Cumulative effects of other past and future water withdrawals have been previously evaluated by the Delaware River Basin Commission in their docket evaluation of the diversion system. The M&BC has particular expertise and regulatory authority with respect to water allocation/usage

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within the basin. Any future water withdrawals, if any, will require the separate review and approval of the DRBC. Such future applications will be reviewed on their own merit in light of current conditions within the Delaware River Basin at the time of application. Construction of this project will have no significant adverse impacts (see Item 8 (a) through (c) and Environmental Assessment (Incl 30)).

10. A copy of the Corps of Engineers Environmental Assessment for this project is inclosed (Incl 30).

11. Determination of Compliance with the Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 CFR, Part 230):

a. Determination of Potential Short Term and Long Term Effects of the Proposed Discharge of Fill Material:

(1) Physical Substrate: Construction of the proposed pump station and intake pipe will result in the permanent elimination of approximately 0.22 acres of existing wetland vegetation and will temporarily impact approximately 0.8 acres during construction. This wetland area has apparently originated and is currently maintained through water seepage from the adjacent Delaware Canal. This area is not directly connected to the Delaware River estuary and does not possess any unusual wetland characteristics. The site is typical of many floodplain forested areas in southern Pennsylvania. The most abundant plants in the tree size class are green ash, silver maple, sycamore, box-elder, and river birch. The shrub layer is dominated by spice bush while the ground cover consists of Japanese honeysuckle and purple loose-strife and bur-cucumber in the wetter areas.

While the project will result in some wetland loss (0.22 acres), the loss is not considered to be significant and represents an unavoidable impact. Wetland alteration has been reduced to the minimum practicable and any areas disturbed during construction (not permanently filled) shall be restored to their pre-construction condition (approximately 0.23 acres).

(2) Water Circulation/Fluctuation: The proposed discharge of fill material will have no significant effect on flood storage capacity of the area.

(3) Suspended Particulate/Turbidity: No significant effect anticipated. There will be an increase in turbidity during construction of the project. However, any adverse effects will be temporary in nature.

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Construction will be performed during the months of November through March and will be performed in accordance with sound construction practices and procedures to minimize any adverse impacts on the existing environment.

(4) Contaminant Availability: No significant effect.

(5) Aquatic Ecosystem Structure and Function: No significant effect (see item 11 (a)(1) above).

(6) Proposed Dredged Disposal Site: Not applicable.

(7) Cumulative Impact on the Aquatic Ecosystem by the Proposed Filling Operation: While the construction of the proposed work will eliminate approximately 0.22 acres of wetlands habitat through filling, this impact is not considered significant to the overall ecosystem of the area (see item 8 (f, g) and item 11 (a)(1)). Any future permit applications involving filling of special aquatic sites would be evaluated on their merits in accordance with applicable Federal regulations and guidelines in force at the time of application. Issuance of a permit for the proposed project would not, in itself, require issuance of approvals for other similar projects proposed in the future.

(8) Secondary Impacts on the Aquatic Ecosystems as a result of the Discharge of Fill Material: No effect other than those specified in this report.

**b. Determination of Compliance with Guidelines:**

(1) Water Dependency - The proposed project by its very nature is considered to be a water dependent activity. That is, the activity associated with the discharge of fill material (intake structure and conduit) must be located or sited in or in close proximity to the Delaware River in order to fulfill its basic purpose.

(2) Alternatives to the Proposed Discharge of Fill Material: See item 9 (b) above. The proposed project has been designed and will be constructed in a manner as to minimize to the maximum extent practicable, adverse impacts on the aquatic environment. Upon completion of the work, all areas disturbed during construction will be restored as closely as possible to their pre-construction condition. On balance, it is considered

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that the project, as proposed, represents the least environmentally damaging practicable and reasonable alternative available to the proponents of the project.

(3) The proposed discharge will not violate applicable State water quality standards or toxic effluent standards or prohibition, jeopardize the existence of Federally listed endangered or threatened species or their habitat or violate the requirements of any Federally designated marine sanctuary.

12. Findings: Based on the information and data available, it has been found that the work proposed in Department of the Army permit application NAPOP-R-80-534-3 is consistent with current Federal regulations (33 CFR 320 et seq.) and is in conformance with Federal guidelines (40 CFR 230). The project has been designed and the work will be performed in accordance with sound engineering principles and procedures so as to minimize to the maximum extent practicable any adverse impact on the surrounding environment.

There is a definite need for the project as demonstrated by the issuance of Delaware River Basin Commission Docket approval, and Pennsylvania Department of Environmental Resources permits.

After a complete review and evaluation of all available pertinent information, including comments, reports, and studies submitted by the public, it has been determined that the proposed work would not result in any significant adverse impacts to the environment and that the project design is consistent with the national concern for both protection and utilization of important resources.

On balance, it has been determined that the proposed work is not contrary to the general public interest and that the public interest would best be served by issuance of a Department of the Army permit.

13. Conclusion: It has been determined that a Department of the Army permit should be issued for the work described in Department of the Army permit application NAPOP-R-80-534-3 with the following special conditions:

a. That the pipeline crossing of the Delaware/Pennsylvania Canal and the construction of the intake structure in the Delaware River shall be

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performed in accordance with the methods and procedures specified in the attached document entitled "General Construction Procedures".

b. That in order to minimize and/or mitigate adverse impacts on archaeological and historic resources and values, the proposed construction work shall be performed in accordance with the conditions, specifications and procedures set forth in the attached "Memorandum of Agreement" and references thereto.

c. That all proposed construction/excavation and maintenance work in the Delaware River shall be performed during the months of November through March.

d. That all required blasting in the Delaware River and Delaware/Pennsylvania Canal shall be performed in accordance with the special requirements and practices set forth by the Pennsylvania Department of Environmental Resources in their Environmental Assessment and Findings, Point Pleasant Water Supply Project, Appendix B, attached.

e. That all areas disturbed during construction shall be stabilized to prevent soil erosion into adjacent waterways and wetland areas.

f. That dredged and/or excavated material shall not be stockpiled or rehandled in the waterways or on any adjacent wetland areas. Construction equipment and/or materials shall not be stored in any wetland areas.

g. That all dredging, excavation and filling shall be performed in such a manner so as to minimize turbidity increases in the Delaware River.

h. That the deposition of dredged and/or excavated materials on shore and all earthwork operations on shore shall be performed in such a manner so as to minimize erosion of material and preclude its entry into the waterways or adjacent wetlands.

i. That the permittee shall employ measures during construction to prevent spills of fuels or lubricants. If a spill occurs, it shall be controlled to prevent its entry into the waterways.

j. That all wetland areas temporarily disturbed during construction (approximately 0.8 acres) shall be restored to their preconstruction elevations and condition. During restoration work, suitable stabilization to prevent soil erosion shall be performed.

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k. That the intake screens and assembly in the Delaware River shall be suitably marked and/or lighted in accordance with U.S. Coast Guard rules and regulations.

1. The permittee shall develop and undertake a research and monitoring program to obtain site specific data on shortnose sturgeon occurrence in and utilization of the project area. The program shall be prepared in coordination with the Corps of Engineers and the National Marine Fisheries Service.

ROGER L. BALDWIN  
Lieutenant Colonel, Corps of Engineers  
District Engineer



Statement of Findings  
List of Inclosures

- Incl 1 - District ltr. dtd 28 October 1980  
ltr. dtd. 8 September 1980 from E.H. Bourguard, Assoc.
- Incl 2 - Application Package NADOP-R-80-534-3
- Incl 3 - DRBC Docket No. D-69-210CP - 29 May 1973
- Incl 4 - DRBC Docket No. D-69-210CP - 5 Nov. 1975
- Incl 5 - DRBC Docket No. G-79-52CP and Docket No. G-79-76CP (P) (DCC & MRA)  
18 February 1981
- Incl 6 - District P.N. NADOP-R-80-534-3 dtd. 6 April 1981
- Incl 7 - District P.N. NADOP-R-80-534-3 Supplement Number 1 dtd. 9 Feb. 82
- Incl 8 - District Notice of Public Hearing NADOP-R-80-534-3-PHG dtd. 10 Aug. 81
- Incl 9 - District Public Hearing Record
- Incl 10 - District P.N. NADOP-R-80-0534-3 dtd. 11 Jan 1982
- Incl 11 - Responses to District Public Notices (approximately 200-350 ltrs)
- Incl 12 - Written correspondence from Congressman James E. Coyne:  
District Letter dated 15 October 1982  
Letter dated 23 September 1982 from James E. Coyne w/incl  
District letter dated 20 May 1982  
Letter dated 8 May 1982 from James E. Coyne  
District letter dated 10 November 1981  
Letter dated 2 November 1981 from James E. Coyne w/incl  
District letter dated 27 August 1981  
District letter dated 19 August 1981 w/incl  
Letter dated 18 August 1982 from James E. Coyne w/incl  
District letter dated 31 July 1981  
District letter dated 9 July 1981  
District letter dated 14 May 1981  
Letter dated 5 May 1981 from James E. Coyne w/incl
- Incl 13 - Written Correspondence from Congressman Robert W. Edgar:  
District letter dated 19 April 1982  
Letter dated 2 April 1982 from Robert W. Edgar  
District letter dated 1 March 1982 w/incl  
District letter dated 23 October 1981  
Letter dated 7 October 1981 from Robert W. Edgar  
Letter dated 27 August 1981 from Robert W. Edgar  
District letter dated 19 August 1981  
District letter dated 5 August 1981 w/incl



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Incl 14 - Written Correspondence from Congressman Charles F. Dougherty:

District letter dated 8 February 1982  
Letter dated 15 January 1982 from Charles F. Dougherty w/incl

Incl 15 - Written Correspondence from Congressman James F. Florio:

District letter dated 19 August 1981 w/incl  
District letter dated 20 July 1981 w/incl  
Letter dated 30 June 1981 from James J. Florio

Incl 16 - Written Correspondence from Representative James G. Greenwood:

Letter dated 17 September 1982 from James G. Greenwood  
Letter dated 28 April 1981 from James G. Greenwood

Incl 17 - Written Correspondence received from U.S. Environmental Protection Agency (Region III):

Letter dated 5 August 1982 from EPA w/incl  
Letter dated 17 March 1982 from EPA w/incl  
District letter dated 18 February 1982  
District letter dated 11 May 1981 w/incl  
Letter dated 5 May 1981 from EPA w/incl

Incl 18 - Written Correspondence from National Oceanic and Atmospheric Administration (National Marine Fisheries Service):

Letter dated 30 August 1982 from NOAA w/incl  
Letter dated 19 July 1982 from NOAA w/incl  
District letter dated 18 February 1982  
Letter dated 8 June 1981 from NOAA

Incl 19 - Biological Assessment (Endangered Species):


District letter dated 12 February 1982 w/incl

Incl 20 - Biological Opinion (Endangered Species):

Letter dated 30 September 1982 from NOAA  
Letter dated 19 July 1982 from NOAA w/incl

Incl 21 - Written Correspondence from U.S.D.O.I. (Fish & Wildlife Service):

Letter dated 18 October 1982 from U.S. Fish & Wildlife Service  
District Letter dated 24 September 1982  
Letter dated 14 September 1982 from U.S. Fish & Wildlife Service  
Letter dated 3 August 1982 from U.S. Fish & Wildlife Service  
Letter dated 23 July 1982 from U.S. Fish & Wildlife Service  
Teletype from U.S. Fish & Wildlife Service  
Letter dated 12 July 1982 from U.S. Fish & Wildlife Service  
District letter dated 1 June 1982  
District letter dated 9 April 1982  
Letter dated 25 March 1982 from U.S. Fish & Wildlife Service

  
District letter dated 18 February 1982  
Letter dated 22 January 1982 from Hershel J. Richman w/incl  
District letter dated 23 October 1981  
District letter dated 2 July 1981 w/incl  
Letter dated 19 June 1981 from U.S. Fish & Wildlife Service  
Letter dated 22 April 1982 from U.S. Fish & Wildlife Service

Incl 22 - Letter dated 29 December 1981 from U.S. Department of the Interior - Keeper of the National Register w/incl

Incl 23 - Memorandum of Agreement (Historic and Archeological Resources):

Letter dated 13 October 1982 from ACHP w/incl  
Letter dated 24 September 1982 from ACHP  
District letter dated 9 September 1982 w/incl (H.O.A.)

Incl 24 - Penna. Department of Environmental Resources - Dams Safety and Encroachment permits (4) dated 2 September 1982

PA. D.E.R. - Environmental Assessment and Findings, Point Pleasant Water Supply Project, August 1982

Incl 25 - Letter dated 2 September 1982 from PA. Department of Environmental Resources (Water Quality Certificate)

Incl 26 - Letter dated 24 March 1982 From PA. Fish Commission  
Letter dated 4 May 1981 from PA. Fish Commission

Incl 27 - Letter dated 25 November 1981 from Mr. George M. Bush, on behalf of Plumstead Township.

Incl 28 - "Report on Evaluation of Rock Evaluation and Impact of Blasting for the Proposed Point Pleasant Pumping Facilities, Point Pleasant Penna." by Converse Ward Davis Dixon dated 20 May 1980.

Incl 29 - Letter dated 4 February 1982 and 28 August 1981 from Converse Ward Davis Dixon w/incls

Incl 30 - District Environmental Assessment

References: See District Environmental Assessment.  
Permit application file NAPOP-R-80-534-3

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NEEDHAMHAY WATER RESOURCES AUTHORITY  
POINT PLEASANT DIVERSION PROJECT  
POINT PLEASANT, BUCKS COUNTY, PENNSYLVANIA  
ENVIRONMENTAL ASSESSMENT

The above Authority has applied for a Department of the Army permit to build and operate a water intake structure in the Delaware River at Point Pleasant about 800 feet downstream of the mouth of the Tohickon Creek. The details of the project are contained in the attached Public Notice dated 6 April 1981, as amended 9 February 1982. We have made this assessment in accordance with the National Environmental Policy Act of 1969, (42 USC 4321 et seq.), Corps of Engineers Policy and Procedures for Implementing NEPA, (33 CFR 230), and Council on Environmental Quality Regulations, (40 CFR 1500 et seq.).

1. Documents

The Point Pleasant Project has been extensively documented. In preparing this assessment we have reviewed and analyzed that lengthy record, and we have drawn upon papers prepared by other Federal or state agencies, or their contractors. The record includes but is not limited to the documents, both pro and con, listed in chronological order below.

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Advisory Council on Historic Preservation, Memorandum of Agreement.

September 1982.

Philadelphia Electric Company, Applicant's Responses to Interrogatories of Del-Aware Unlimited, Inc., (Nuclear Regulatory Commission), 20 August 1982.

Pennsylvania Department of Environmental Resources, Environmental Assessment of the Point Pleasant Project, August 1982.

U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Biological Opinion, 19 July 1982.

Phillippe, J. T., MS, PE, LE, CKY & Associates, Inc. - Letter, re: Point Pleasant Pumping Station, 10 May 1982.

Mince, Elizabeth R. - Preliminary Case Report ... Point Pleasant Diversion Project, 19 March 1982.

Van Arsdale, Judge Donald W. - Opinion, Delaware Water Emergency Group, et al. v. Mansler, et al., U. S. D. C., ED. Pa., Civil Action No. 80-4372, 17 August 1981, affirmed, CA 3, \_\_\_\_\_ F 2d \_\_\_\_\_, 19 March 1982.

Brundage, Harold, Ichthyological Associates, Inc. - Assessment of the Impacts of the Proposed Point Pleasant Pumping Station and Intake on the Shortnose Sturgeon, January 1982.

E. W. Bourquard Associates, Inc., NWRA - Revisions of Application No. NAPOF-E-80-0534-3, January 1982.

Auerbach, Kathryn Ann, Bucks County Conservancy - Comments, Point Pleasant Historic and Archaeological District, November 1981.

U. S. Army Corps of Engineers, Public Hearing Record of Permit Application by MWRA, 15 September 1981.

E. H. Bourquard Associates, Inc., MWRA - Point Pleasant Pumping Station - Location of Water Intake, August 1981.

Hintz, Elizabeth R. - Eligibility Determination Report for the Point Pleasant Historic District, 24 August 1981.

Borough of Morrisville, Objections and Questions of MWRA Permit Applications, July 1981.

Del-AMARE Unlimited, Inc. - Objections and Questions of MWRA Permit Applications, July 1981 (a).

Del-AMARE Unlimited, Inc. - Water Quality Exhibit, Section 8, July 1981 (b).

Betz-Converse-Murdoch, Inc. - Environmental Assessment and Section 404 Analysis of Point Pleasant Diversion Project, January 1981.

Delaware River Basin Commission - Salinity and Point Pleasant Diversion, December 1980.

Delaware River Basin Commission - Transcript of Public Hearing of MWRA and PECO, November 1980.

Radiation Management Corporation - Ecological Division - Vegetation of the Point Pleasant Intake Site, November 1980 (a).

Radiation Management Corporation - Ecological Division - Biological Evaluation of the Proposed Water Intake in the Delaware River at Point Pleasant, Pennsylvania, November 1980 (b).

Delaware River Basin Commission - Final Environmental Assessment for the Neshaminy Water Supply System, August 1980.

Converse Ward Davis Dixon, Inc. - Report on Evaluation of Rock Excavation and Impact of Blasting for the Proposed Point Pleasant Pumping Facilities.

May 1980.

Neshaminy Water Resources Authority - Environmental Report on Neshaminy Water Supply System, February 1979.

Radiation Management Corporation - Ecological Division - Neshaminy Water Supply System, Environmental Report, Water Quality - Aquatic Biota, November 1978.

U. S. Department of Agriculture, Soil Conservation Service - FINAL ENVIRONMENTAL IMPACT STATEMENT, Neshaminy Creek Watershed, Bucks and Montgomery Counties, Pennsylvania, April 1976.

Ichthyological Associates, Inc. - An Ecological Survey of the Delaware River in the Vicinity of Point Pleasant, Pennsylvania, February 1974.

U. S. Atomic Energy Commission - FINAL ENVIRONMENTAL IMPACT STATEMENT, Related to the Proposed Limerick Generating Stations, Units 1 and 2, Philadelphia Electric Company, November 1973.

Delaware River Basin Commission - FINAL ENVIRONMENTAL IMPACT STATEMENT, Point Pleasant Diversion Plan, Bucks and Montgomery Counties, Pennsylvania, February 1973.

## II. CONSULTATION

We have consulted with numerous agencies as listed below, and in addition, we held a Public Hearing on 13 September 1981 at Bucks County Community College, Newtown Township, Pennsylvania, attended by over 1,000 persons.

UNITED STATES

Environmental Protection Agency

Department of Interior, Fish and Wildlife Service

Department of Interior, National Park Service, Keeper of the National  
Register

Advisory Council on Historic Preservation

Department of Commerce, National Oceanic and Atmospheric Administration,  
National Marine Fisheries Service.

DELAWARE RIVER BASIN COMMISSION

COMMONWEALTH OF PENNSYLVANIA

Department of Environmental Resources

Pennsylvania Historical and Museum Commission (State Historic Preservation  
Officer)

III. NEED FOR PROPOSED PROJECT

The need for a surface water supply (the entire Point Pleasant Diversion  
System) has been explained fully by others, principally by the Delaware  
River Basin Commission, the Federal-interstate agency having primary  
responsibility, control, and expertise regarding use of water in the  
Delaware Valley. DRBC has incorporated the Diversion Project into DRBC's



Comprehensive Plan, and has set forth its reasons in a Final Environmental Impact Statement (1973) and in a Final Environmental Assessment (1980). Those actions by DRBC have received judicial approval, (see VanArtsdalen, Judge Donald W., in I. DOCUMENTS, above). The need for the entire Point Pleasant Project is therefore settled, and no longer an issue.

We are processing a permit application, not for the entire Diversion System, but only for a part thereof; that intake structure to be built in the Delaware River, and the conduit which is to pass under the Pennsylvania Canal. The need for the Diversion System having already been determined, the need for the intake structure and related piping is manifest; without those parts, the System cannot operate. The intake structure and piping as planned is the only practicable method for taking water from the River and pumping it into the System.

#### IV. ENVIRONMENTAL IMPACTS

##### General Construction Impacts -

Short-term adverse environmental impacts expected during construction will include an increase in background noise due to rock excavation by blasting and use of construction equipment. Air quality would be decreased during construction due to increased traffic and construction equipment. Traffic will be impaired on Route NO. 32 causing traffic delays and detours until construction is complete. Rock excavation by blasting can be controlled so

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as to result in no noticeable damage to nearby structures or wells by blast-generated ground motion, airblasts and flyrock (Converse Ward Davis Dixon, 1980).

Canal Crossing Construction Impacts -

Installation of the intake conduit under the Canal will be accomplished in the dry. A temporary roadway and dike is proposed to be installed across the canal utilizing materials excavated from the site. An upstream weir will bypass the Canal flow into the Delaware River. Temporary pumping facilities are proposed to pump water from the Delaware River to the downstream side of the temporary dike to provide continual water supply to the Canal downstream of the construction site. This water will maintain the aquatic environment in the Canal at its present state.

Water between the dike and Lock No. 14 would be pumped to a sedimentation basin in order that sediments in the pumping process would not create excessive siltation in the Delaware River. During the pumpout process fish would be removed, as directed by the Pennsylvania Fish Commission, and either returned downstream or placed in the Delaware River. The trench will then be excavated and conduit installed. After installation is complete the surface of the excavated portion of the Canal will be shaped to original contours, and impervious soils from the trench excavation will be used for replacement of the Canal lining. The temporary dike would then be removed and water returned by opening Lock No. 14. The impacts to the aquatic environment in the Canal would be minimized using the bypassing technique described. A few fish can be expected to be injured or expire during

the removal process but the impact on the fish community as a whole would be minimal and short term. Proper sediment and erosion control measures would prevent materials from entering the Canal or Delaware River. After the Canal crossing is completed, the disturbed banks and bottom would have no long term visual disturbance.

#### Intake Construction Impacts -

Installation of intake conduit and gate well will be preceded by the staking of wetlands and the placement of hay bales to avoid wetlands disturbance.

The total area of affected wetlands is 0.30 acres, which is about one-third of the 0.93 acre of wetlands on the site (E. H. Bourquard Associates, Inc., 1982). The wetlands are typical of many floodplains forests in southeastern Pennsylvania. The most abundant plants in the tree size class are green ash, silver maple, sycamore, box-elder, and river birch. The shrub layer is dominated by spice bush while the ground cover consists of Japanese honeysuckle, purple loosestrife and bur-cucumber in the wetter areas (RMC, 1980), of this, 0.22 acre of wetlands will be permanently destroyed by the placement of fill. The applicant has revised the plans (E. H. Bourquard Associates, Inc., 1982) to minimize wetlands lost to the smallest acreage practicable. The remaining 0.08 acres of wetlands disturbed during construction will be restored to original grade and returned to pre-construction conditions. There will be no temporary stockpiling of excavated materials on wetland areas.

The installation of the intake screens and intake pipes have been scheduled for a period during the months of November through March to avoid adverse impacts of aquatic life during the spawning season. This seasonal restriction will also avoid disruption of the anadromous fish run of American shad. The trench for the three intake pipes would be excavated by barge mounted equipment, and barges used for temporary stockpiling of excavated materials. There would be a short-term increase in suspended sediments but its impact would be minimized by the storage of materials on a barge rather than instream stockpiling, and the work is proposed to be done during a period of low biological activity.

The trench excavation will require blasting on the lower two feet of the intake screen location. The high peak pressures and rapid rise times of shock waves produced by explosives have been found to be the most damaging to fish. In order to minimize adverse impacts a "scare charge" will be detonated near the blast area to clear the area of finfish prior to the excavation blast. The peak shock waves will be minimized by placing small charges at the bottom of a drilled hole and all blast holes will be stemmed with sand.

After the intake structure and intake pipe have been placed in the trench the excavated material will be used as backfill in the trench. The intake structure will be supported by a continuous concrete foundation and will be protected from erosion by a rip-rap blanket. Excess excavated rock will be used for the rip-rap blanket.

#### Operational Impacts -

Long-term impacts resulting from the operation of the pumphouse facility would include an increase in the background noise level in the immediate vicinity of the pumphouse and a change in the existing aesthetics of the site. These impacts are proposed to be mitigated by sound insulating the pumphouse and landscape screening of the site to reduce noise levels. Landscaping utilizing flora indigenous to the area in addition to the design and construction of the pumphouse structure being aesthetically compatible with the surrounding historic district would minimize any long-term aesthetics impacts.

Operation of the water intakes can impact aquatic biota through entrainment and impingement. Entrainment refers to the passage of small planktonic or nektonic organisms through the intake screens and impingement is the capture of aquatic organisms on the screens. The intake screening system as described in the RMC Biological Evaluation, 1980 report is

"state-of-the-art" technology in reducing impacts of entrainment and impingement. Some loss of aquatic organisms would occur but the potential for adverse impact will be minimized by the use of these screens. The early life stages of several finfish occur in the vicinity of the intake but their potential for involvement with the intake is low. Most fish eggs and larvae are too large to be entrained through a 2 mm slot and the combination of an intake velocity of less than 0.3 foot/sec. and a parallel river velocity of at least twice the intake velocity would practically eliminate impingement of organisms. The small percentage of water (maximum of 3 percent at low

flow and 1.25 percent of average flow at Trenton) and organisms that would be withdrawn from the river through this intake would not result in biologically significant impacts to the aquatic community.

The control of chlorides during low flow drought conditions has been and is a primary objective of the DRBC's comprehensive water resources planning and regulatory process. Withdrawal of freshwater as permitted and conditioned by the DRBC has been determined by them to have no significant adverse impact on the Delaware River system. One of the basic missions of the DRBC is to understand and control the movement of salt water in the estuary. The DRBC can curtail or suspend operation of the project; the Commission will also review and consider bi-annual monitoring reports which must be made by the NWRA on ecological changes (if any). The Federal District Court has affirmed on 17 August 1981 that it is the role of the DRBC to make flow determinations along the Delaware in the interest of precluding the upstream advance of salinity of well fields and surface water users of the river waters. (District Court, 1981).

Pumpage of water for power generation by Philadelphia Electric Company (PECO) would be suspended when river flow at Trenton is less than 3,000 cfs, unless compensated by off-stream storage. Therefore, salinity intrusion would not be affected by withdrawal of freshwater for use by the Limerick Generating Station during drought conditions.

Approximately 90 percent of the water diverted from Point Pleasant for municipal water supply needs in Bucks and Montgomery Counties would return to the basins hydrologic system. The net loss of freshwater able to repel chlorides during a drought would be about 4.5 mgd (7 cfs). The Point Pleasant Diversion, as conditioned by DRBC Section 3.8 approvals of Limerick Generating Station and the Neshaminy Water Supply System would have no significant affect on salinity intrusion during a drought in the Delaware River Basin.

The proposed project would not have a significant adverse impact on down-stream dissolved oxygen (D.O.). A model simulation was performed by the DRBC Level B staff using their one dimensional version of the Delaware Estuary water quality model. Parameters included were low river flow (2780 cfs) and the maximum water diversion at Point Pleasant (95 mgd). This resulted in a predicted reduction in D.O. of only 0.08 mg/l in the Trenton to Philadelphia reach (zone 2). There would be an even smaller reduction in dissolved oxygen when the river flow is greater than 3,000 cfs or when lesser volume of water is diverted as river flow falls below 3,000 cfs during drought conditions (DRBC, 1980).

The cumulative effect of the Point Pleasant Diversion together with the existing withdrawals would have no significant adverse effect on salinity intrusion or dissolved oxygen to the City of Philadelphia, to the South Jersey aquifers, or to fish and wildlife resources.



## V. Alternatives

Available pumping station sites along the Delaware River that would be physically and economically feasible to develop for pumping water to the headwaters of the Neshaminy and Perkomen watersheds are extremely limited. The general area was investigated quite thoroughly for such sites before the present site at Point Pleasant was selected (DRBC, 1973).

The topographical configuration and present land uses of the area at and southwest of the Village of Point Pleasant is such that it does not offer a wide choice of sites for a major pumping installation. The northern portion of the Village, being more developed, would be an undesirable and costly location for an intake, pumping station and transmission pipeline; also locating the pump station in a more northerly location is precluded by the existence of archaeological sites. The southernmost portion is severely restricted by the lack of adequate level terrain due to the closeness of the bluff and State Route 32 to the river bank. Locating the pump station in a more southerly direction is further precluded by the existence of an archaeological site located southeast of the proposed intake conduit.

Another major constraint is the location and effect of the Tohickon Creek. The combined Transmission Main should, if possible, be located south of the Tohickon Creek in order to avoid crossing a major stream in a deep rock valley. In addition, upon entering the Delaware River, the water from Tohickon Creek produces a significant change of flow velocity of the river with the accompanying turbulence and eddies. The effect of the eddies has

been the build-up of a large sediment deposit in the river below the mouth of the Creek. The river intake should be located at some distance away from these alluvial deposits in order to avoid siltation at the intake entrance.

The proposed intake alignment intercepts the actual river channel and thus the main river at about a right angle and approximately 800 feet downstream of the mouth of the Tohickon Creek. At this point, the river channel has returned to a more normal cross-section after having been restricted by the alluvial deposition below its confluence with the Tohickon Creek. In summary, once it was determined that the Point Pleasant area was the appropriate location for the withdrawal the specific site selected for the pump station is the most practicable.

An onshore traveling screen intake system aligned flush with the river bank was considered as an alternative to the presently proposed wedge-wire intake system. It was determined that a traveling screen system would adversely impact the aquatic environment by impingement and entrainment losses. The presently proposed intake would mitigate those losses.

#### VI. ENDANGERED SPECIES

A biological assessment was prepared addressing the potential effects of the project on the endangered shortnose sturgeon, Acipenser brevirostrum, pursuant to Section 7 of the Endangered Species Act. The assessment was forwarded to the National Marine Fisheries Service who have in turn prepared a biological opinion. The opinion concluded that construction and operation

of the Point Pleasant Pumping Station is not likely to jeopardize the continued existence of the endangered shortnose sturgeon in the Delaware River. No critical habitat has been designated in the area. No other Federally threatened or endangered species are known to occur at the project site.

#### VII. CULTURAL PRESERVATION

The Pennsylvania Canal is on the National Register of Historic Places and is a National Historic Landmark. Subsequent to our receiving this permit application, it was determined by the Keeper of the National Register that the Point Pleasant Historic District, within the boundaries of which the intake structure will be located was eligible for inclusion on the Register.

In view of the above, and pursuant to the National Historic Preservation Act, 16 USC 470, and regulations thereunder, 36 CFR 800, we have coordinated processing of this permit application with the Pennsylvania State Historic Preservation Officer and with the Advisory Council on Historic Preservation. We have entered into a Memorandum of Agreement with the SHPO and the ACHP to safeguard these historic places. The terms of the memorandum will be made a condition of the permit.

## VIII. FINDINGS

### A. ENVIRONMENTAL IMPACT STATEMENT

Three Final Environmental Impact Statements have already been written in connection with the Point Pleasant Diversion Project: (1) U.S. Atomic Energy Commission, (1973); (2) Delaware River Basin Commission, (1973); (3) Department of Agriculture, Soil Conservation Service, (1976). In addition, a Final Environmental Assessment was written by DRBC in 1980 which was so complete and comprehensive as virtually to constitute a fourth EIS.

The Project was challenged in Delaware Water Emergency Group v. Hansler, referred to in Part I of this assessment, and the plaintiffs there argued, among other things, that a new EIS was needed before valid action could be taken. The Court rejected this contention, finding that at some point, it is appropriate to act, based on knowledge at hand, even though studies may be continuing. The Court observed:

I do not think that Congress ever  
intended to so burden Federal  
action with interminable study  
upon study.

No new Environmental Impact Statement is required for construction of the Point Pleasant Diversion Project, whole and entire. Only the portion thereof known as the intake structure is within Corps jurisdiction and the subject of this permit application; to consideration of that portion we now turn.

### B. NO MAJOR FEDERAL ACTION

None of the planning, engineering, construction, or operation of the Point Pleasant intake structure has been or will be performed or funded by the Federal Government; all of that "action" has been and will be non-Federal. Nevertheless, issuance of a permit will effectively transform such work into "Federal action", and the Government's representatives will vicariously become the actors. Whether or not the action will be major depends upon the nature, scope, and magnitude of the work permitted.

"Major" is a term of reasonable connotation which may appropriately be applied to a project involving many millions of dollars, large areas, and displacement of a large number of persons, e.g., a dam and reservoir covering many square miles, construction of an interstate highway, construction of a penitentiary, and so on. This intake structure does not fall within that category. The work will cost an estimated \$3-6 million, it will not affect any large area, it will displace no persons, and it will affect no large segment of wildlife. Issuance of a permit for the intake

structure will be, not a major, but a minor Federal action, and accordingly will require no Environmental Impact Statement.

#### G. NO SIGNIFICANT EFFECT

Installation of the water intake, conduit, and pumphouse will be accomplished by use of ordinary heavy construction methods, as outlined in Section IV. A. of this assessment. That construction will impose upon a very limited number of persons the slight disruption and inconveniences attendant upon laying of a water main in a rural area. In no sense can this construction be construed as having any significant effect upon the quality of the human environment.

Operation of the intake system might, on a given day, remove a maximum of 95 million gallons from the River. What effect this will have depends upon: (1) how many days the system is used, (2) how much of the water is returned to the River, and (3) how voluminous is the stream flow. All of those matters have been studied and analyzed in the documents mentioned in Section I of this assessment, e.g., DRBC Final Environmental Assessment, August 1980. In particular, it has been determined that operation of this intake will affect dissolved oxygen content in the River only to a slight degree, and will affect salinity in the estuary to an imperceptible extent.

We therefore conclude that issuance of this permit will not significantly affect the quality of the human environment, within the meaning of the National Environmental Policy Act, Section 102, (42 USC 4332 (2) (C)). We further find that there are no unresolved conflicts concerning alternative uses of available resources, within the meaning of NEPA, Section 102, (42 USC 4332 (2) (E)). Accordingly, no Environmental Impact Statement will be prepared in regard to issuance of this permit.

14 October 1982

DATE

R. L. Baldwin

ROGER L. BALDWIN

Lieutenant Colonel, Corps of Engineers

District Engineer



ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

11/30/82

DEL-AWARE UNLIMITED, INC., :  
VAL SIGSTEDT, COLLEEN WELLS, MARC :  
SADOUX, MARION W. MASLAND, Township :  
of Bristol, NORMAN and DIANE :  
TORKELSON, The PHILADELPHIA :  
FEDERATION of SPORTSMEN'S CLUBS, :  
SAMUEL LANDIS, CHARLES GILMORE, :  
MARY ELLEN NOBLE, The PENNSYLVANIA :  
STATE FEDERATION of SPORTSMEN'S :  
CLUBS, Honorable RITA C. BANNING, :  
WATERSHED ASSOCIATION of The :  
DELAWARE RIVER, Honorable JAMES C. :  
GREENWOOD, and HONORABLE CARL :  
FONASH. :

CIVIL ACTION

Plaintiffs, :

vs. :

ROGER M. BALDWIN, individually, and :  
as District Engineer, U.S. Army :  
Corps of Engineers, and :  
ALEXANDER ALDRICH, individually, :  
and as Chairman of the Advisory :  
Council on Historic Preservation, :  
WILLIAM GORDON, individually, and as :  
Assistant Secretary, U.S. Department :  
of Commerce, GERALD HANSLER, :  
individually and as Executive :  
Director, The Delaware River Basin :  
Commission, HAROLD DENTON, :  
individually, and as Director, :  
Division of Nuclear Reactor :  
Regulation, U.S. THE NUCLEAR :  
REGULATORY COMMISSION, HONORABLE :  
PETER DUNCAN, as Secretary of the :  
Department of Environmental :  
Resources of the Commonwealth of :  
Pennsylvania, NESHAMINY WATER :  
RESOURCES AUTHORITY, and :  
PHILADELPHIA ELECTRIC COMPANY. :

NO. 82-5115

Defendants. :

Reported by:  
Sidney Rothschild  
Gregg Wolfe

OFFICIAL COURT REPORTERS

Room 2722  
U.S. Courthouse  
Philadelphia, Pa. 19106

WALSH 5340

A. 161

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Philadelphia, Pennsylvania

November 30, 1982  
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BEFORE: HONORABLE JAMES T. GILES, J.

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FIRST DAY  
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## 1 APPEARANCES:

2 ROBERT SUGARMAN, ESQ.,  
3 MARY COE, ESQ.,  
4 ROBIN LOCKE, ESQ.,  
5 for Federal Defendants.

6 JANICE SIEGEL, ESQ.,  
7 JOAN K. GARNER, ESQ.,  
8 for Federal Defendants.

9 PETER CRANE, ESQ.,  
10 Acting Assistant General Counsel  
11 for The Nuclear Regulatory Commission.

12 HERSHEL J. RICHMAN, ESQ.,  
13 WILLIAM J. CARLIN, ESQ.,  
14 ALAN M. LERNER, ESQ.,  
15 for Meshaminy Water Resources Authority.

16 DAVID J. GOLDBERG, ESQ.,  
17 for Delaware River Basin Commission.

18 BERNARD CHANIN, ESQ.,  
19 TROY B. CONNER, JR., ESQ.,  
20 ROBERT M. RADER, ESQ.,  
21 for Philadelphia Electric Company.

22 LOUISE S. THOMPSON, ESQ.,  
23 Assistant Counsel  
24 for Commonwealth of Pennsylvania  
25 Department of Environmental Resources.

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1 THE COURT: Good afternoon.

2 I have read the various papers filed yesterday  
3 and this morning. The purpose of this conference was to  
4 discuss the scope of the hearing for this Court's review  
5 of the administrative proceedings all of which this Court  
6 has appellate jurisdiction, adding which are ripe for review.

7 With respect to the scope of review, in a sense,  
8 both sides are right. This Court is limited in its review  
9 of the administrative agency to the administrative record,  
10 to determine whether or not, under either a reasonableness  
11 standard or an arbitrary and capricious standard the agency  
12 somehow misapplied the law, misinterpreted the evidence,  
13 overlooked certain testimony, or unreasonably reached no  
14 significant impact determinations.

15 This Court will review the administrative  
16 record to the extent that the plaintiff alleges that the  
17 administrative record fails to show a basis for the actions  
18 or the determinations of the agency.

19 The burden will be upon the plaintiff to show  
20 that the agency failed to consider what plaintiffs contend  
21 to be significant environmental impacts.

22 Here, the plaintiffs contend, I believe, that  
23 there was legal error in that some or all of the defendants  
24 had responsibility for preparation and promulgation of  
25 environmental impact study and failed to cause such to be

1 issued, prepared, issued or promulgated. So, the plaintiff  
2 will have the burden of showing that, under the law and the  
3 administrative record evidence, that such environmental  
4 impact study was required.

5           Testimony outside of the administrative record  
6 is not precluded in my opinion as a matter of law; the  
7 Court has discretion to permit it, where it would tend to  
8 advance specific allegations by the plaintiffs that the  
9 administrative record is deficient, so as to render the  
10 decision made by the administrative agency without evidence  
11 and without consideration of the various environmental  
12 considerations imposed under the regulations and statute  
13 upon the agency to review, analyze and consider.

14           This Court will not sit in judgment on the  
15 decision-makers in the agency or agencies.

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1 This Court's scope of review will be  
2 whether or not the administration record demonstrated that  
3 the defendant agencies carried out their responsibilities  
4 procedurally in terms of the applicable statute and  
5 statutes -- here we're talking, I believe, about the National  
6 Environmental Policy Act principally, as those obligations  
7 have been interpreted by the Supreme Court of the United  
8 States and by the Third Circuit.

9 With respect to the review of the administra-  
10 tive record and the facts and the conclusions therefrom  
11 already given by this Court in Delaware Water Emergency Group  
12 et al. vs. Gerald M. Mansler, and an opinion rendered by  
13 my colleague, Judge VanArtsdalen, the same will be binding  
14 upon the parties and will be adopted by the Court as the  
15 bottom to this Court's supplemental consideration of what  
16 may be the supplemental administrative record applicable to  
17 this case.

18 Therefore, this Court adopts as finally  
19 binding upon all of the parties to this litigation the  
20 decision by Judge VanArtsdalen.

21 Now, Mr. Sugarman, as I see it, you have a  
22 burden of showing in this court that there is final agency  
23 action, which is within my jurisdiction to review, and that  
24 the agency failed to perform some non-discretionary function,  
25 or acted arbitrarily and capriciously in avoiding

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1 consideration of amulatory factors which point towards  
2 significant environmental effects, as opposed to no environ-  
3 mental or no significant environmental impact.

4 Now, that reference to the administrative  
5 record means more than whether or not the agency declined  
6 to receive a certain position of some witness of the  
7 plaintiffs appearing for the agency. The burden of the  
8 plaintiff would be to show that the agency failed to consider  
9 the subject from whatever source.

10 So I expect you to identify presently what  
11 you consider to be complete omissions, as well as significant  
12 omissions of subjects which would have rendered the conclusions  
13 of the agency erroneous as a matter of law.

14 Are there any questions about what I conceive  
15 to be the scope of review?

16 MR. SUGARMAN: I think your Honor has drawn  
17 on certain aspects of the Overton Park case in identifying  
18 the scope of review and, of course, that is the governing  
19 Supreme Court statement of the scope of review, and the  
20 issues before the Court.

21 I would like -- I understand that the Court's  
22 direction is that the testimony of witnesses, that as to  
23 matters not in the administrative record, would go to show  
24 that the agency acted without evidence or without considera-  
25 tion of various environmental requirements imposed by

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1 statutes and regulation on the agency.

2 THE COURT: I said it may be received.

3 I didn't say it absolutely will be received.

4 MR. SUGARMAN: I am sorry, it may be received.

5 THE COURT: If it's going to go to what I  
6 concede to be your burden of proof --

7 MR. SUGARMAN: Right, exactly. That's the  
8 point I wanted to address, sir.

9 I would raise two questions, if I may. One  
10 is that the Administrative Procedure Act in its language  
11 and as interpreted by the Overton Park case, indicates that  
12 among the issues to be considered, are whether the agency  
13 abused its discretion or acted under an error of law or mis-  
14 understanding of the statute, and whether its actions were  
15 abusive discretion in that respect.

16 Now, I take it from your Honor's description  
17 of the standard of review, that that question would be  
18 included.

19 THE COURT: Yes.

20 If it's as a matter of law, but not -- I  
21 would have exercised a different approach in resolving the  
22 factual dilemma.

23 MR. SUGARMAN: I understand your Honor's  
24 statement then very clearly.

25 The other question that I would have is that

1 the defendants will specify portions of the record that they  
2 believe to be directly counter or responsive to what you  
3 contend and then you will have an opportunity to specify  
4 other parts of the record, if you wish, by the next morning  
5 and I will read it. I am going to have to read most of the  
6 record anyway and I am not frightfully afraid to do that,  
7 and if we were to start tomorrow, I would be in no better  
8 position, in terms of reviewing the essential documents than  
9 I would be at the close of tomorrow or even Thursday morning.

10 MR. SUGARMAN: I don't think you would be,  
11 my point is this --

12 THE COURT: Now, that is the way we will do it.  
13 We will start on Thursday morning with your presentation of  
14 those portions of the record that you believe to be significant,  
15 as outlined yesterday, and you may argue to me why you believe  
16 there has been a post-Judge VanArtsdalen's decision change, and  
17 why you believe the Commission failed within the scope of the  
18 entire record to consider that subject; that's what I said  
19 this morning.

20 MR. SUGARMAN: That applies to the DRBC?

21 THE COURT: Yes, and on each point I will give  
22 you a chance to argue, and I will give the other side a chance  
23 to argue before I decide whether or not testimony is necessary  
24 to educate me, because each one of these points becomes  
25 really a little trial within itself.

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